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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 985. ~~626~~ ~~298~~ 72

EZRA D. FRITTS, CHARLES H. BRIGGS, AND JOSEPH A. THATCHER ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE W. PALMER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED SEPTEMBER 13, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered that heretofore and on, to wit, the 26th day of June, A. D. 1879, came George W. Palmer, by J. Q. Charles, Esq., his attorney, and filed in said court his complaint, and sued out of said court a writ of summons against Ezra D. Fritts, Joseph A. Thatcher, C. H. Briggs, William Nicholson, William A. Scott, and Adelaide M. Scott; and the said complaint is in words and figures as follows, to wit:

Complaint.

In the Circuit Court of the United States for the District of Colorado. Oct. Term, 1879.

GEORGE W. PALMER, Plaintiff,

vs.

EZRA D. FRITTS, JOSEPH A. THATCHER, C. H. BRIGGS, WILLIAM NICHOLSON, WILLIAM A. SCOTT, and ADELAIDE M. SCOTT, Defendants.

Petition.

George W. Palmer, plaintiff, states that he is a citizen of the State of Indiana, and that Ezra D. Fritts, Joseph A. Thatcher, C. H. Briggs, and William Nicholson, defendants, are citizens of the State of Colorado, and that William A. Scott and Adelaide M. Scott, his wife, defendants, are citizens of the State of Illinois.

And plaintiff states that heretofore, to wit, on the twentieth
2 day of May, A. D. 1878, he was entitled to the possession of the following-described real estate and property situate in the county of Gilpin and State of Colorado, to wit: The North Comstock lode, being ten hundred and eleven feet (1,011) in length on the vein and being the same property which was located by Ezra D. Fritts on the 23rd of October, 1876, as appears of record in book F², page 486 of the records of the county of Gilpin; also the Grand View lode, being three hundred and eighteen feet (318), more or less, in length on the vein, and being the same property which was located by Ezra D. Fritts on the 7th day of November, A. D. 1876, as appears of record in book F², page 486 of the records of the county of Gilpin; also the Clipper lode, in the city of Central, county of Gilpin, being fifteen hundred feet in length by one hundred and fifty feet in width (1,500 x 150) of surface ground on said vein, four hundred and twenty feet (420) of said lode being situate westerly, and ten hundred and eighty feet (1,080) being situate easterly from a point over the entrance of discovery adit, and more particularly described as follows, to wit: Beginning at the S. E. corner, whence ¼ section corner in east boundary section 12, T. 3, R. 73 west, bears S. 85° 2′ 12″ E. 2,022.6 feet; Gregory Hill bears S. 24° E., and Russell mountain bears S. 26° 55′ west; thence S. 71° 43′ west 1,500 feet; thence north 18° 17′ W. 150 feet; thence west 71° 43′ east 1,500 feet; thence south 18° 17′ east 150 feet to the place of beginning; also the Comstock lode, consisting of fifteen hundred feet (1,500) along the vein thereof

and more particularly described as follows, to wit: Beginning at the northeasterly corner, whence ¼ section corner in east boundary, sec. 12, T. 3 S., R. 73 W., bears S. 79° 48′ 5″ E. 2,572 feet; thence S. 38° 28″ W. 1,500 feet; thence north 51° 32″ W. 150 feet; thence north
38° 28′ E. 1,500 feet; thence S. 51° 32′ E. 150 feet to place of
3 beginning; also a certain building lot situate in the city of Central, on the northerly side of High street, being forty feet (40) in width on said High street by fifty feet (50) in depth, together with the dwelling-house situate thereon, the said lot and house being the same property which was conveyed to said Fritts by David and Annie Jenkins, and by said Fritts to William Einstein and S. W. Tyler, by warranty deed dated March 8th, 1877, and is now in the occupancy of said William Nicholson.

And plaintiff states that being so entitled to the possession thereof the defendants afterwards, to wit, on the twenty-first day of May, A. D. 1878, entered into such premises and unlawfully withholds from the plaintiff the possession thereof, to the damage of the plaintiff in the sum of ten thousand dollars, and plaintiff states that the monthly value of said premises is one thousand dollars.

Plaintiff prays judgment against defendants for the possession of said premises, with damages to the amount of ten thousand dollars and one thousand dollars monthly value, together with costs, &c.

(S'g'd) GEORGE W. PALMER, *Pl'ff.*

(Endorsed:) 270. U. S. circuit court, district of Colorado. George W. Palmer *vs.* Ezra D. Fritts *et al.* Petition. Filed Jun. 26, 1879. (S'g'd) Edward F. Bishop, clerk. J. Q. Charles, att'y for pl'ff.

And the said summons, with the proof of service thereon by the marshal, is in words and figures as follows, to wit:

4 *Summons.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

GEORGE W. PALMER, Plaintiff,

versus

EZRA D. FRITTS, JOSEPH A. THATCHER, C. H. BRIGGS, WILLIAM NICHOLSON, WILLIAM A. SCOTT, ADELAIDE M. SCOTT, Defendants.

Complaint. Filed in the clerk's office this 26th day of June, A. D. 1879.

The President of the United States of America to the above-named defendants, Greeting:

You and each of you are hereby notified that an action has been brought in said court by George W. Palmer, plaintiff, against you as defendants to recover the possession of certain real estate situate in the county of Gilpin, State of Colorado, to wit: The North Comstock lode, as located by Ezra D. Fritts October 23rd, 1876, of record

in book F², page 486, records of Gilpin county; the Grand View lode, as located by said Fritts on Nov'r 7th, 1876, of record in book F², page 486, records of Gilpin county; the Clipper lode in the city of Central; the Comstock lode; also a certain building lot in the city of Central, on the northerly side of High street, 40 feet in
5 width on High street by 50 feet in depth, with the dwelling-house thereon, all said property being more particularly described and set forth in the complaint filed herein, and to which reference is here made. Damages to the amount of $10,000.00, one thousand dollars monthly value, together with the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you if such service shall be made within the county of Arapahoe; otherwise, within forty days from the day of service, and if you fail to do so the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at the city of Denver, in said district, this 26th day of June, A. D. 1879, and of the Independence of the United States the 103d year.

[Seal Circ. C't.]

(S'g'd) EDWARD F. BISHOP, *Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, } ss.:
District of Colorado, }

DENVER, COLO., *July* 10, 1879.

I hereby certify that I received the within writ on the 27th
6 day of June, A. D. 1879, and that I have personally served the same on Joseph A. Thatcher by leaving a certified copy of the same at his usual place of abode in Central City, Gilpin county, Colorado, July 9th, A. D. 1879, with O. Vannettisch, a person over the age of 15 years; also served the same upon William Nicholson by leaving a certified copy of the within at his usual place of abode at Central City, Gilpin county, Colorado, July 9th, A. D. 1879, with the wife of the said William Nicholson, who is a member of his family above the age of 15 years; also served a copy the same day on William A. Scott by delivering to him a certified copy of the same at Denver, Arapahoe county, State and district of Colorado, on the 5th day of August, A. D. 1879—Ezra D. Fritts, C. H. Briggs, and Adelaide M. Scott not found in my district or any place of residence of said defendants.

This writ, therefore, returned served, as the law directs, this 8th day of August, A. D. 1879.

(S'g'd) P. P. WILCOX, *Marshal.*

(Endorsed:) Gen. No. 270. Circuit court of the United States, district of Colorado. George W. Palmer, plaintiff, *versus* Ezra D. Fritts *et al.*, defendant-. Summons. Filed this 8th day of August, A. D. 1879. (S'g'd) Edward F. Bishop, clerk. J. Q. Charles, attorney for plaintiff.

And afterwards and on, to wit, the 14th day of October, A. D. 1879, the same being one of the regular juridical days of the October term, A. D. 1879, of said court—present, the Honorable
7 Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Leave to Amend Complaint.

GEORGE W. PALMER
vs.
EZRA D. FRITTS, JOSEPH A. THATCHER, C. H. BRIGGS, WILLIAM NICHOLSON, WILLIAM A. SCOTT, and ADELAIDE M. SCOTT. } 270.

For possession of specific real property, &c.

At this day come the said defendants, save William A. and Adelaide M. Scott, by L. C. Rockwell, Esq., their attorney.

And the demurrer of the said defendants to the complaint herein coming on now to be heard, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said complaint is not sufficient in law.

Nevertheless it is ordered that the said plaintiff have leave to amend his complaint herein within five (5) days from this day, as he shall be advised.

And afterwards and on, to wit, the 25th day of October, A. D. 1870, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his amended complaint; and the said amended complaint is in words and figures as follows, to wit:

Amended Complaint.

In the Circuit Court of the United States of Colorado.

8 GEORGE W. PALMER, Plaintiff,

vs.

EZRA D. FRITTS, JOSEPH A. THATCHER, C. H. BRIGGS, WILLIAM NICHOLSON, WILLIAM A. SCOTT, and ADELAIDE M. SCOTT, Defendants.

And now comes the said plaintiff and amends his complaint, heretofore filed in this cause, by inserting after the words "William Nicholson," in the 9th line on the last page of writing of said —, the following averment, viz: And the said plaintiff avers that he is the owner in fee of said property above described.

(Signed) GEORGE W. PALMER,
By J. Q. CHARLES, *His Att'y.*

(Endorsed:) No. 270. George W. Palmer *vs.* Ezra D. Fritts *et al.* Amended complaint. Filed Oct. 29, 1879. (S'g'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 19th day of November, A. D. 1879, came the said defendants, by L. C. Rockwell, Esq., their attorney, and filed in said court and in said cause their answer to the complaint heretofore filed herein; and the said answer is in the words and figures as follows, to wit:

Answer.

UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

In the United States Circuit Court.

GEORGE W. PALMER, Pl'ff,
ag'st
EZRA D. FRITTS, JOSEPH A. THATCHER, CHARLES H. BRIGGS, William Nicholson, Impleaded with William A. Scott & Adelaide M. Scott, Def'ts.

The defendants, Ezra D. Fritts, Joseph A. Thatcher, Charles H. Briggs, and William Nicholson, for an answer to the complaint, say:

1st. They admit that they are citizens of the State of Colorado, but cannot say where plaintiff resides, or of what State he is a citizen. These defendants, & each of them, deny that plaintiff, on the 20th day of May, A. D. 1878, or at any other time, was entitled to any part or portion of the premises mentioned or described in the complaint; they, and each of them, deny that plaintiff on that day or at any other time was the owner in fee or otherwise entitled to the premises described in complaint or any part or portion thereof.

II. These defendants, further answering, say they, & each of them, deny that on the twenty-first day of May, A. D. 1878, or at any other time,— entered into said premises, or in any other way deprived plaintiff of the same; and they, and each of them, deny that they wrongfully withhold from the plaintiff the possession of said premises or any part thereof; they, & each of them, deny that plaintiff has sustained damages to the amount of ten thousand dollars, or any other sum, by reason of defendants' acts in holding possession of said premises; whereupon they, & each of them, demand judgment for costs of suit.

(S'g'd) L. C. ROCKWELL,
Att'y for Deft's.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

James A. Thatcher, being first duly sworn, deposes & says he is one of the above-named defendants; that he has heard the foregoing answer read & knows the contents thereof, and that the same is true of his own knowledge, & that this verification is made for & on behalf of all other defendants in this case.

(S'g'd) JOSEPH A. THATCHER.

Subscribed and sworn to before the undersigned, a notary public in and for the county of Arapahoe, in the State of Colorado, at said Arapahoe county, this 22d day of October, A. D. 1879.

Witness my hand and notarial seal.

[NOTARIAL SEAL.] (S'g'd) WM. H. SALISBURY,
Notary Public.

(Endorsed:) 270. United States circuit court. George W. Palmer *vs* Ezra D. Fritts *et al.* Answer. Filed Nov. 19, 1879. (S'g'd) Edward F. Bishop, clerk. L. C. Rockwell, att'y for def'ts.

And afterwards, and on, to wit, the 2nd day of January, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses
11 Hallet, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Cause Continued.

GEORGE W. PALMER *vs.* EZRA D. FRITTS *et al.*

Action for possession of specific real property, &c.

At this day it is ordered by the court, pursuant to a stipulation thereto herein filed, that this cause stand continued to the next term of the court.

And afterwards and on, to wit, the 27th day of June, A. D. 1884, the same being one of the regular juridical days of the May term of A. D. 1884 of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial and Taken Under Advisement.

GEORGE W. PALMER
vs.
EZRA D. FRITTS, JOSEPH A. THATCHER, C. H. BRIGGS, WILLIAM NICHOLSON, WILLIAM A. SCOTT, and ADELAIDE M. SCOTT. } 270.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by H. C. Dillon, Esq.,
12 his attorney, and the said defendants, Ezra D. Fritts, Joseph A. Thatcher, C. H. Briggs, and William Nicholson, by L. C. Rockwell, Esq., their attorney, also come.

And this cause now coming on to be tried by the court without a jury, pursuant to a stipulation thereto herein filed, is submitted to the court upon an agreed statement of facts, and the court doth thereupon take the same under advisement.

And afterwards and on, to wit, the 7th day of July, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Finding for Plaintiff and for Judgment.

GEORGE W. PALMER
vs.
EZRA D. FRITTS *et al.* } 270.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys, respectively, and the court, being now sufficiently advised in the premises, doth find the issues herein joined for the said plaintiff and against the said defendants, and that the said plaintiff is the owner of in fee and entitled to the possession of the premises described in the complaint.

Wherefore it is ordered by the court that judgment be entered herein in favor of the said plaintiff and against the said de-
13 fendants, Ezra D. Fritts, Joseph A. Thatcher, and Charles H. Briggs, for the possession of the premises described in the complaint, and the said plaintiff's costs, to be taxed.

And afterwards and on the same day, to wit, the 7th day of July, A. D. 1884, judgment was duly entered against the said defendants in the judgment book of said court, in pursuance of the statutes and rules of court.

And the said judgment is in words and figures as follows, to wit:

Judgment.

GEORGE W. PALMER
vs.
EZRA D. FRITTS, JOSEPH A. THATCHER, C. H. BRIGGS, WILLIAM NICHOLSON, WILLIAM A. SCOTT, and ADELAIDE M. SCOTT. } 270.

Action for possession of specific real property and for damages.

On this 7th day of July, A. D. 1884, the same being one of the regular juridical days of the May term, A. D., 1884, of said court, there being present the Honorable Moses Hallett, district judge:

It is considered by the court that the said plaintiff do have and recover of and from the said defendants possession of the property, lands, and tenements in said complaint described, to wit:

The following-described real estate situate in the county of Gilpin and State of Colorado, to wit, the North Comstock lode, being ten hundred and eleven (1,011) feet in length on the vein
14 and being the same property which was located by Ezra D. Fritts on the 23rd day of October, 1876, as appears of record in book F, page 486, of the records of the county of Gilpin; also the Grand View lode, being three hundred and eighteen (318) feet more or less in length on the vein, and being the same property which was located by Ezra D. Fritts on the 7th day of November, A. D. 1876, as appears of record in book F 2, page 486, of the records of the county of Gilpin; also the Clipper lode, in the city of Central, county of Gilpin, being fifteen hundred feet in length by one hun-

dred and fifty feet in width (1,500 x 150) of surface ground on said vein, four hundred and twenty (420) feet of said lode being situate westerly and ten hundred and eighty (1,080) feet, being situate easterly from a point over the entrance of discovery adit and more particularly described as follows, to wit: Beginning at the S. E. corner, whence ¼ section, corner in east boundary section 12, T. 3, R. 73 west, bears S. 85° 2′ 12″ E. 2,022.6 feet; Gregory hill bears S. 24° E. and Russell mountain bears S. 26° 55′ west; thence S. 71° 43′ west 1,500 feet; thence north 18° 17′ W. 150 feet; thence west 71° 43′ east 1,500 feet; thence south 18° 17′ east 150 feet to the place of beginning; also the Comstock lode, consisting of fifteen hundred (1,500) feet along the vein thereof and more particularly described as follows, to wit, beginning at the northeasterly corner, whence ¼ section corner in east boundary sec. 12, T. 3 S., R. 73 W., bears S. 79° 48′ 5″ E. 2,572 feet; thence S. 38° 28′ W. 1,500 feet; thence north 51° 32′ W. 150 feet; thence north 38° 28′ E. 1,500 feet; thence S. 51° 32′ E. 150 feet to place of beginning; also a certain building lot situate in the city of Central, on the northerly side of High street, being forty (40) feet in width on said High street by fifty(50) feet in depth, together with the dwelling-house situate thereon, the said lot and house being the same property which was conveyed to said Fritts by David and Annie Jenkins and by said Fritts to William Einstein and S. W. Tyler by warranty deed dated March 8th, 1877, and that he have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendants his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 18th day of December, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order Vacating Judgment.

GEORGE W. PALMER
vs.
EZRA D. FRITTS *et al.* } 270.

Action for possession of specific real property and for damages.

At this day come the said defendants, by L. C. Rockwell, Esq., their attorney, and move the court to vacate the judgment lately had herein and for a new trial of the issues herein.

And it appearing to the court that the taxed costs herein have been fully paid and discharged by the said defendants:

Therefore it is ordered that the judgment lately and on the 7th day of July last past had herein be vacated and for naught held, and that a new trial of the issues herein joined be had in pursuance of the statute in such case made and provided.

And afterwards and on, to wit, the 14th day of January, A. D. 1886, came again the said plaintiff, by H. C. Dillon, Esq., his attorney, and the said defendants, by E. A. Reynolds, Esq., their attorney, and filed in said court and in said cause their agreed statement of facts.

And the said agreed statement of facts is in words and figures as follows, to wit:

Agreed Statement of Facts.

UNITED STATES OF AMERICA, DISTRICT OF COLORADO, } ss:
County of Arapahoe, }

In the Circuit Court of the United States for the District of Colorado.

GEORGE W. PALMER, Plaintiff,
vs.
EZRA D. FRITTS, JOSEPH A. THATCHER, CHARLES H. BRIGGS, and WILLIAM NICHOLSON, Defendants.

It is hereby stipulated and agreed by and between the par-
17 ties to the above-entitled suit that trial by jury is waived for this second trial of the issues herein joined, and this cause for the purposes of this trial shall be submitted to the court upon the following agreed statement of facts, upon which the court is asked to declare the law and enter judgment accordingly:

First. This suit in ejectment is for the recovery of the real estate and mining property, with the appurtenances thereunto belonging, situated in Gilpin county, Colorado, described in the plaintiff's complaint herein, now in the possession of the said defendants, and has been since June 1st, 1878.

Second. The common source of title to the said property is William Groshon.

Third. That the said William Groshon, on the 16th day of June, A. D. 1877, at Central City, in the said Gilpin county, made, executed, acknowledged, and delivered in due form of law his deed of warranty for the property described in the said complaint to the Comstock Mining Company, which was then a corporation created and organized under and by virtue of the laws of the State of Missouri and doing business as a mining company in said county of Gilpin, and said warranty deed was afterwards duly recorded in the office of the clerk and recorder of said Gilpin county June 25th, A. D. 1877, in book 62, at page 443.

Fourth. That the said Comstock Mining Company afterwards and on the same day, at the said city of Central, made, executed, and delivered to the said Ezra D. Fritts its three (3) certain promissory notes, by the first of which it promised, on or before August
18 1st, 1877, to pay to the order of Ezra D. Fritts ten thousand dollars ($10,000), for value received, with interest from date until paid at the rate of ten per cent. per annum, said second note being payable on or before August 1st, 1877, and said third note being payable on or before December 1st, 1877, but in amounts and all other respects like the said first-mentioned note, which said sum of thirty thousand dollars ($30,000) was intended to be used and was

used by the said company in part payment of the purchase-money of said property so as aforesaid conveyed, to wit, by the said William Groshon, and afterwards, and on the same day, for the purpose of securing the payment of the said promissory notes to the said Ezra D. Fritts, made, executed, acknowledged and delivered at Central City, in the said county of Gilpin, its certain deed of trust to Joseph A. Thatcher as trustee for the said Ezra D. Fritts of all and singular the said property, except the Clipper lode, in said complaint mentioned and described, conditioned that in case of default in the payment of the promissory notes, or either of them, or the interest thereon, that the said trustee might sell and dispose of the said mining property for the purpose of paying the same in manner and form more particularly mentioned in the said deed of trust, which said deed of trust was dated on the 23rd day of June, 1877, duly acknowledged at the said county of Gilpin, and afterwards and on the 26th day of June, 1877, duly recorded in the said county of Gilpin in book 64, at page 37.

Fifth. That afterwards and on the 5th day of January, in the year A. D. 1878, for default in the payment of the said promissory notes, the said Joseph A. Thatcher, trustee, caused the said deed of trust to be foreclosed under the power of sale in the said deed of trust contained, at the said city of Central, and on that day made, exe-
19 cuted, acknowledged, and delivered in due form of law his deed of all and singular the said real estate and mining property, excepting the said Clipper lode, to the said Ezra D. Fritts, which said trustee's deed was afterwards and on the 7th day of January, A. D. 1878, duly recorded in the said Gilpin county in book 64, at page 156.

Sixth. That the said defendants, Ezra D. Fritts, Joseph A. Thatcher, Charles H. Briggs, and William Nicholson, derived title and possession under and by virtue of divers mesne conveyances in due form of law from the said Comstock Mining Company and its assigns under said deed of trust for the property described in the complaint, excepting the said Clipper lode, which was not included in said deed of trust and has never been conveyed to any one by the said Comstock Mining Company.

Seventh. That the said Comstock Mining Company was duly incorporated under and by virtue of the laws of the State of Missouri June 15th, A. D. 1887, for the purpose of carrying on the mining business, and with the object in its articles of incorporation, expressed to purchase, own, and control mining property, both real and personal, in the State of Colorado, and to conduct a mining business therewith.

That afterwards and on the 16th day of June, 1877, and before the purchase of the said real estate and mining property from the said William Groshon, the said Comstock Mining Company was actively engaged in the prosecution of its said mining business at and in the neighborhood of Central City, in said county of Gilpin, established an office in the said city of Central, and was employing men and purchasing supplies and machinery for the prosecution of its said mining business, having sundry superintendents,

20 agents, and employees, and was then actively engaged in prosecuting the usual business appertaining to mining companies in this State, and continued so to do until after the making and foreclosure of the said deed of trust as aforesaid; that said company was organized for the purpose of mining.

Eighth. That the said Comstock Mining Company, at the time of purchasing the said property from the said William Groshon, had not, nor has it since at any time, complied or attempted in anywise to comply with section one (1) of article fifteen (15) of the constitution of the State of Colorado, nor with sections twenty-three (23) and twenty-four (24) of chapter nineteen (19) of the General Laws of this State, otherwise known as sections 260 & 261 of chapter 19 of the General Statutes of this State, 1883, describing the terms and conditions upon which foreign corporations may do business in this State.

Ninth. That the said William Groshon, on the 13th day of April, A. D. 1878, made, executed, acknowledged, and delivered, in due form of law, his certain deed of quit-claim of all and singular the real estate and mining property in the said complaint mentioned to Samuel S. Porter, which said deed was afterwards and on the 20th day of May, 1878, duly acknowledged and delivered to the said Samuel S. Porter, but still remains unrecorded; and the said Samuel S. Porter afterwards and on the 20th day of May, A. D. 1878, by his deed of quit-claim of that date, executed in due form of law, conveyed all and singular the said real estate and mining property to the plaintiff, George W. Palmer, which said deed was afterwards and on the 25th day of May, 1878, duly acknowledged and delivered to the said George W. Palmer, but still remains unrecorded.

21 Tenth. That afterwards and on June 28th, A. D. 1879, at 9.15 o'clock a. m., the said George W. Palmer filed his *lis pendens* in the office of the clerk and recorder of said county of Gilpin, which now remains of record in book 69, at page 42 thereof, and in and by the same gave due notice, according to law, of the beginning of this suit and the nature of the same in manner and form as contained in the said complaint.

That the value of the property in controversy exceeds $5,000, exclusive of costs.

That a copy of the incorporation laws of the State of Missouri, under which this company was organized, were, at the time of the organization of this company, on file in the office of the secretary of state of the State of Colorado, but were not filed by this company.

That the articles of incorporation of this company were filed in the office of the clerk and recorder in and for Gilpin county, Colorado, where the company was authorized to do business in this State, and where its business interests were located on August 10th, 1877, and that a copy of the incorporation laws of the State of Missouri, under which this company was organized, were also on file in the office of the clerk & recorder of Gilpin county at and after this company was organized.

That during the time defendants have been in possession of the property they have been holding the same in good faith under the

deeds above set forth, and they have paid as taxes, which were legally assessed and levied upon said property, the sum of $400, and that plaintiff has paid no taxes thereon; that defendants have put improvements upon said property in the way of building & re-
22 pairing the dwelling-house described in the complaint in the sum of $350; that the rental of said property during the time defendants have been in possession has been $15 per month only.

Defendants shall have the right to amend their answer, filed herein, disclaiming all interest in and possession of all property and premises described in the complaint, excepting the Comstock lode.

(S'g'd) HENRY C. DILLON,
Att'y for Plaintiff.

(S'g'd) E. A. REYNOLDS,
Att'y for Briggs & Fritz.

L. C. ROCKWELL,
Att'y for Thatcher & Wm. Nicholson.

(Endorsed:) 270. In the circuit court of the United States for the district of Colorado. George W. Palmer *vs.* Ezra D. Fritts, Joseph A. Thatcher, Charles H. Briggs, and William Nicholson. Stipulation waiving jury, to amend answer, and agreed statement of facts. Filed Jan. 14, 1880. (S'g'd) Edward F. Bishop, clerk.

23 And afterwards and on the same day, to wit, the 14th day of January, A. D. 1886, came again the said defendants, by Messrs. L. C. Rockwell and E. Allen Reynolds, their attorneys, and filed in said court and in said cause their amended answer to the complaint heretofore filed herein.

And the said amended answer is in words and figures as follows, to wit:

Amended Answer.

UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

GEORGE W. PALMER, Plaintiff,
vs.
EZRA D. FRITTS, JOSEPH A. THATCHER, CHARLES H. BRIGGS, and WILLIAM NICHOLSON, Impleaded with WILLIAM A. SCOTT and ADELAIDE M. SCOTT, Defendants.

24 Now come the defendants, Ezra D. Fritts, Joseph A. Thatcher, Charles H. Briggs, and William Nicholson, impleaded with William A. and Adelaide M. Scott, and file this their amended answer, which is filed by leave of the court, made in pursuance of the agreement so to do between the parties, and for answer to said complaint say:

First. That as to so much of the property and premises described in the complaint as the Clipper lode, being 1,500 feet in length by

150 feet in width, these defendants and each of them disclaim all right, title, and interest therein, and they and each of them deny they ever ousted the plaintiff therefrom; deny that they have ever been in the possession thereof.

Second. That as to all of said property described in said complaint, saving and excepting said Clipper lode, these defendants and each of them deny that plaintiff, on the 20th day of May, 1878, or at any other time, was entitled to any part or portion of said premises; they and each of them deny that on said date, or at any other time, plaintiff was the owner in fee or otherwise entitled to the premises described in the complaint, or any part or portion thereof, saving and excepting said Clipper lode.

Third. These defendants and each of them, further answering said complaint, deny that on the 21st day of May, 1878, or at any other time, they ousted said plaintiff from said premises, or in any way or manner deprived plaintiff of the same; and they and each of them deny that plaintiff was upon that date, or at any other time, entitled to the possession of said premises or any part or portion thereof, saving and excepting said Clipper lode; and they and each of them deny they wrongfully withhold from the plaintiff the possession of said premises or any part or portion thereof; and
25 they and each of them deny that plaintiff has sustained damages by reason of defendants' acts in holding possession of said premises or otherwise in the amount of $10,000, or in any other sum whatsoever; and defendants and each of them deny the monthly value of said premises is $1,000, or any other sum of money whatsoever, saving and excepting the sum of $15 per month.

Fourth. These defendants and each of them, further answering said complaint, say that said Nicholson simply occupied a portion of said premises at the time of the commencement of this suit, to wit, the dwelling house described in the complaint, as the tenant of said Thatcher, Fritts, and Briggs, and not otherwise, and that his right thereto as tenant has long since ceased and determined.

Fifth. These defendants and each of them, further answering said complaint, say that on the 20th day of May, 1878, said Thatcher, Fritts, and Briggs were claiming title to said premises, saving and excepting said Clipper lode, by conveyances to them executed in due form of law, as the owners thereof, in good faith and under claim and color of title derived by divers mesne conveyances from the original locators of said premises and the original occupants thereof, and that while defendants have been occupying said premises they have paid in taxes, legally assessed thereon, the sum of $400, and that said plaintiff has paid no taxes thereon; that defendants have made improvements upon the dwelling house described in said complaint while they have thus been holding said premises in the sum of three hundred and fifty dollars.

Wherefore defendants pray to be hence dismissed with their reasonable costs.

L. C. ROCKWELL,
26 *Att'y for Def'ts Thatcher and Nicholson.*
E. ALLEN REYNOLDS,
Att'y for Def'ts Briggs and Fritts.

(Endorsed:) No. 270. In the circuit court of the United States. George W. Palmer, plaintiff, *vs.* Ezra D. Fritts *et al.*, impleaded, etc., defendants. Amended answer. Filed Jan. 14, 1886. (S'g'd) Edward F. Bishop, clerk. L. C. Rockwell and E. Allen Reynolds, att'ys for def'ts.

And afterwards and on the same day, to wit, the 14th day of January, A. D. 1886, the same being one of the regular juridical days of the October term, A. D. 1885, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Taken Under Advisement.

GEORGE W. PALMER
vs.
EZRA D. FRITTS *et al.* } 270.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by H. C. Dillon, Esq., his attorney, and the said defendants by L. C. Rockwell, Esq., their attorney, also come.

And this cause now coming on to be tried by the court without a jury, pursuant to a written stipulation thereto, herein filed,
27 and upon an agreed statement of facts, is argued by counsel and by the court taken under advisement.

And afterwards and on, to wit, the 23rd day of January, A. D. 1886, the same being one of the regular juridical days of the October term, A. D. 1885, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Judgment for Plaintiff.

GEORGE W. PALMER
vs.
EZRA D. FRITTS, JOSEPH A. THATCHER, C. H. BRIGGS, WILLIAM NICHOLSON, WILLIAM A. SCOTT, and ADELAIDE M. SCOTT. } 270.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys respectively:

And this cause having heretofore come on to be tried by the court without a jury, pursuant to a written stipulation thereto, herein filed, and upon an agreed statement of facts, and the court having heard the arguments of counsel and taken the same under advisement, and the court being now sufficiently advised in the premises, the court doth find the issues herein joined for the said plaintiff and against the said defendants, and that the said plaintiff is the owner

of in fee and entitled to the possession of the premises described
28 in the complaint herein, and doth assess his damages by occasion of the detention thereof in the sum of ——.

Wherefore, on motion of the said plaintiff, it is ordered by the court that judgment be entered herein in favor of the said plaintiff and against the said defendants, Ezra D. Fritts, Joseph A. Thatcher, Charles H. Briggs, and William Nicholson, impleaded with William A. Scott and Adelaide M. Scott, for the possession of the premises as in the complaint herein described, for the sum of six hundred and forty-five dollars ($645.00) damages for the detention thereof, in form aforesaid assessed, and for the said plaintiff's costs, to be taxed.

And thereupon and on the same day, to wit, the 23rd day of January, A. D. 1886, judgment was duly entered against the said defendants in the judgment-book of said court in pursuance of the statutes and rules of court.

And the said judgment is in words and figures as follows, to wit:

Judgment.

GEORGE W. PALMER
v.
EZRA D. FRITTS, JOSEPH A. THATCHER, C. H. BRIGGS, WILLIAM NICHOLSON, WILLIAM A. SCOTT, and ADELAIDE M. SCOTT. } 270.

Action for possession of specific real property and for damages.

On this 23rd day of January, A. D. 1886, the same being
29 one of the regular juridical days of the October term, A. D. 1885, of said court, there being present the Honorable Moses Hallett, district judge:

It is considered by the court that the said plaintiff do have and recover of and from the said defendants possession of the property, lands, and tenements in said complaint described, to wit, the following-described real estate and property, situate in the county of Gilpin and State of Colorado, to wit: The North Comstock lode, being ten hundred and eleven (1,011) feet in length on the vein, and being the same property which was located by Ezra D. Fritts on the 23d day of October, 1876, as appears of record in book T², page 486, of the records of the county of Gilpin; also the Grand View lode, being three hundred and eighteen (318) feet more or less in length on the vein, and being the same property which was located by Ezra D. Fritts on the 7th day of November, A. D. 1876, as appears of record in book F², page 486, of the records of the county of Gilpin; also the Clipper lode, in the city of Central, county of Gilpin, being fifteen hundred feet in length by one hundred and fifty feet in width (1,500 x 150), of surface ground on said vein, four hundred and twenty (420) feet of said lode being situate westerly and ten hundred and eighty (1,080) feet being situate easterly from a point over the entrance of discovery adit, and more particularly described as follows, to wit: Beginning at the S. E. corner, whence ¼ section corner in east boundary section 12, T. 3, R. 73 west, bears S. 85° 2′ 12″ E. 2022.6

feet, Gregory Hill bears S. 24° E., and Russell mountain bears S. 26° 55′ west; thence S. 71° 43′ west 1,500 feet; thence north 18° 17′ W. 150 feet; thence west 71° 43′ east 1,500 feet; thence south 18° 17′ east 150 feet to the place of beginning; also the Comstock lode, consisting of fifteen hundred (1,500) feet along the vein thereof, and particularly described as follows, to wit: Beginning at the northeasterly corner, whence ¼ section corner in east boundary sec. 12, T. 3, S. R. 73 W., bears S. 79° 48′ 5″ E. 2,572 feet; thence S. 38° 28′ W. 1,500 feet; thence north 51° 32′ W. 150 feet; thence north 38° 28′ E. 1,500 feet; thence S. 51° 32′ E. 150 feet to place of beginning; also a certain building lot, situate in the city of Central, on the northerly side of High street, being forty (40) feet in width on said High street by fifty (50) feet in depth, together with the dwelling-house situate thereon, the said lot and house being the same property which was conveyed to said Fritts by David and Annie Jenkins, and by said Fritts to William Einstein and S. W. Tyler, by warranty deed dated March 8th, 1877, and is now in the occupancy of said William Nicholson, and that the said plaintiff have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendants six hundred and forty-five dollars ($645), his damages by occasion of the premises in his complaint mentioned, in form aforesaid assessed, and his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 2d day of February, A. D. 1886, came again the said defendants, by L. C. Rockwell, Esq., their attorney, and filed in said court and in said cause their bond, and sued out of said court a writ of error to the Supreme Court of the United States.

And the said bond is in words and figures as follows, to wit:

Bond.

Know all men by these presents that we, Joseph A. Thatcher, as principal, and George W. Briggs, as sureties, all of Arapahoe county, in the State of Colorado, are held and firmly bound unto George W. Palmer, his heirs, executors, administrators, and assigns, in the penal and just sum of two thousand dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of February, A. D. 1886.

The condition of the above obligation is such that whereas George W. Palmer lately, in the circuit court of the United States for the district of Colorado, at the October term thereof, A. D. 1885, recovered a judgment in ejectment against Ezra D. Fritts, Charles H. Briggs, William Nicholson, and Joseph A. Thatcher, impleaded with William A. Scott and Adelaide M. Scott, for the North Comstock lode, the Grand View lode, and the Comstock lode, situate in Cen-

tral City mining district, Gilpin county, Colorado, together with $645 as damages; and the said Ezra D. Fritts, William H. Nicholson, Charles H. Briggs, and Joseph A. Thatcher, impleaded as aforesaid, having obtained a writ of error to reverse the judgment of said court and a citation directed to the said George W. Palmer and Henry C. Dillon, his attorney, having been signed, citing and admonishing said Palmer to be and appear at a term of the Supreme Court of the United States to held at Washington, in the District of Columbia, on the second Tuesday in October, in the year A. D. 1886:

32 Now, therefore, if the said Ezra D. Fritts, Charles H. Briggs, William Nicholson, and Joseph A. Thatcher, impleaded with William A. Scott and Adelaide M. Scott, shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make good their said plea, then the said above obligation to be void; otherwise to remain in full force and effect.

(S'g'd) JOSEPH A. THATCHER. [SEAL.]
(S'g'd) GEORGE W. BRIGGS. [SEAL.]

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

—— —— and —— ——, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in —— the sum set opposite his name—that is to say; As to —— ——, —— dollars; as to —— ——, —— dollars; as to —— ——, —— dollars, over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

Subscribed and sworn to before me this 2nd day of February, 1886.

—— ——.
—— ——.

Approved Feb'y 2d, 1886.
(S'g'd) MOSES HALLET,
Dist. Judge.

(Endorsed:) No. 270. Circuit court of the United States, district of Colorado. George W. Palmer *vs.* Ezra D. Fritts *et al.*
33 Bond upon writ of error. Filed Feb. 2, 1886. (S'g'd) Edward F. Bishop, clerk.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

34 *Writ of Error to — Court U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings as also in the rendition of

the judgment of a plea which is in the said circuit court between Geo. W. Palmer, plaintiff, and Ezra D. Fritts, Chas. H. Briggs, Jos. A. Thatcher, William Nicholson, Wm. A. Scott, and Adelaide M. Scott, defendants, a manifest error hath happened, to the great damage of the said Ezra D. Fritts, Chas. H. Briggs, Jos. A. Thatcher, and Wm. Nicholson, impleaded with Wm. A. Scott and Adelaide M. Scott, as by the complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 11th day of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 2nd day of February, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 110th year.

EDWARD F. BISHOP, *Clerk.*

Allowed by—

MOSES HALLETT, *Judge.*

35 [Endorsed:] Gen. No. 270. Supreme Court of the United States. Ezra D. Fritts *et al.*, plaintiffs in error, *vs.* George W. Palmer. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 2d day of Feb'y, A. D. 1886. Edward F. Bishop, clerk, by —— ——, deputy clerk. L. C. Rockwell, E. A. Reynolds, attorney- for plaintiffs in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 25th day of August, A. D. 1886.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

The within writ of error having been served by lodging a copy thereof for the defendant in error in the clerk's office within sixty days (60), Sundays exclusive, after the rendering of judgment herein and having given the security required by law this writ of error is, therefore, a supersedeas.

Teste: EDWARD F. BISHOP, *Clerk.*

36 And thereupon a citation was issued, duly served upon the said plaintiff, and returned and filed in said court and in said cause.

And the said citation is next hereto attached, to wit:

37 *Citation U. S. — Court.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to George W. Palmer, Greeting:

You are hereby cited and admonished to be and appear at a regular term of the Supreme Court of the United States to be holden at Washington city, District of Columbia, on the eleventh day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Ezra D. Fritts, Charles H. Briggs, Joseph A. Thatcher, William Nicholson, William A. Scott, and Adelaide M. Scott are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against Ezra D. Fritts, Chas. H. Briggs, Jos. A. Thatcher, and Wm. Nicholson, four of the *the* said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, dist. judge of the circuit court of the United States for the district of Colorado, this 2nd day of February, in the year of our Lord one thousand eight hundred and eighty-six.

MOSES HALLETT, *Judge.*

38 [Endorsed:] Gen. No. 270. Circuit court of the United States, district of Colorado. Ezra D. Fritts, *et al.* plaintiffs in error, *vs.* George W. Palmer, defendant in error. Citation. Filed in circuit court of the U. S. this 2d day of Feb'y A. D. 1886. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk.

Proof of Service.

THE UNITED STATES OF AMERICA, *District of Colorado.* } *ss:*

On this 2d day of February, A. D. 1886, I have hereby accepted service of a copy of the within citation.

HENRY C. DILLON,
Att'y for Geo. W. Palmer, Pl'ff.

39 UNITED STATES OF AMERICA, *District of Colorado.* } *ss:*

I, Edward F. Bishop, clerk of the circuit court of the United States for the District of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court, and in a certain cause lately in said court

pending, wherein George W. Palmer was plaintiff and Ezra D. Fritts *et al.* were defendants, as fully and completely as the same still remains on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district this 24th day of August, A. D. 1886.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Clerk's Fees.

Preparing manuscript, 98 fols. @ 10c	9 80
Certificate & seal	35
Paid by pl'ffs in error.	$10 15

Endorsed on cover: Colorado C. C. U. S. No. 985. Ezra D. Fritts, Charles H. Briggs, Joseph A. Thatcher, *et al.* plaintiffs in error, *vs.* George W. Palmer. Filed September 13, 1886.

UNITED STATES

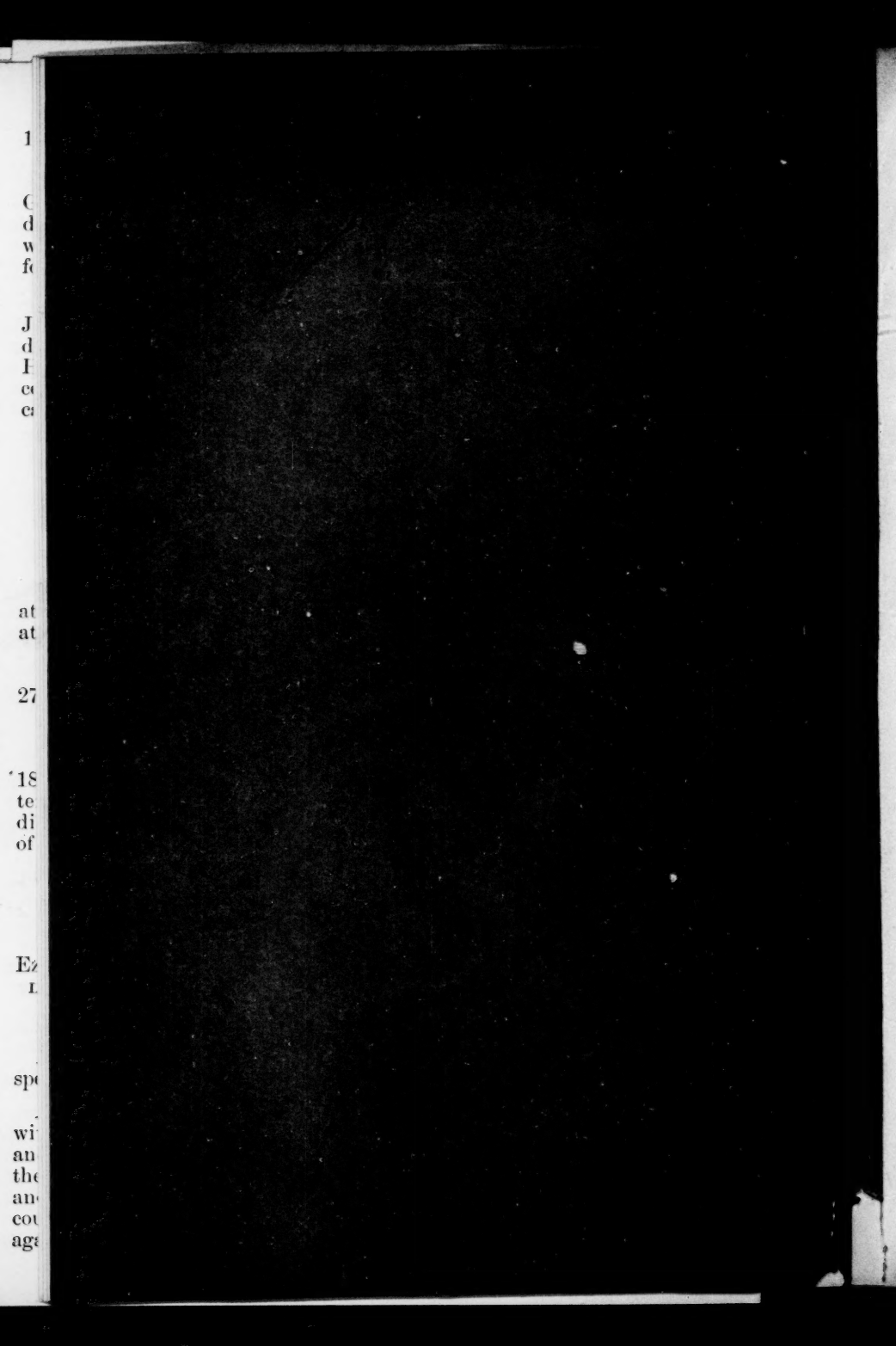
OCTOBER TERM, 1858

BERA D. PETERS, *et al.*,
Plaintiffs in Error,
vs.
GEORGE W. PALMER,
Defendant in Error.
No. 98.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF GEORGIA.

Brief and Argument for Plaintiffs in Error.

L. C. ROCKWELL,
E. A. REYNOLDS,
Attorneys for Plaintiffs in Error.



Supreme Court U. S.
FILED.
APR 16 1889
JAMES H. McKENNEY,
Clerk.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1888.

EZRA D. FRITS, CHARLES H. BRIGGS and JOSEPH A. THATCHER *et al.*,
Plaintiffs in Error,
vs.
GEORGE W. PALMER,
Defendant in Error.

No. 338.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO.

This is a motion to dismiss and affirm under Rule VI. of this court. And,

First—Has the Court jurisdiction to hear and determine this cause? That it has, is settled by numerous adjudications of this Court. The agreed statement of facts (page 9) recites, after waving a trial by jury, "This cause for the purpose of this trial shall be submitted to the Court upon the following agreed statement of facts, upon which the Court is asked to declare the law and enter judgment accordingly." This statement must be

considered to be equivalent to a special finding by the Court and to present questions of law alone for its consideration. Had the Court attempted to make special findings, it would have but reiterated the statement of facts. This statement contained the ultimate facts on which the law of the case must determine the rights of the parties. A special finding of the Court could do no more. Upon these facts the Court ruled the law of the case to be with the plaintiff. That this Court will review such a judgment see Board of Supervisors of Wayne county, Plaintiff in error, *vs.* Kennicott, 13 Otto, 554.

The case was this: The county of Wayne, Illinois, mortgaged certain swamp lands to secure an issue of bonds by the Mt. Vernon Railroad Company, but it did not obligate itself to pay the debt. It simply mortgaged its swamp and overflowed lands for the benefit of the company. Default having been made in the payment of the debt, suit was brought in the Circuit Court of the United States in the Southern District of Illinois to foreclose the mortgage. On June 25, 1874, a decree was entered finding the amount due and directing that the lands of the county be sold and the proceeds applied to the payment of the debt. From this decree the county appealed to this Court, giving a bond in the penal sum of forty thousand dollars with a large number of persons as sureties, conditioned according to law for a supersedeas.

This Court having affirmed the decree at its October term, 1876, the óbligees sued on the bond, alleging two hundred thousand dollars damages because the Board of Supervisors failed to make good their plea in this Court, and also fifty thousand dollars damages for the depreciation of the value of the land during the pendency of the appeal, and twenty-five thousand dollars damages as attorneys' fees for attending the appeal, and fifty thousand dollars taxes on the land during the pendency of

the appeal. The cause was submitted upon an agreed statement of facts, signed by the attorneys of the respective parties, which statement of facts waived a trial by jury and recited:

"It is further agreed that, so far as the right of recovery in this case is concerned, it shall be deemed and considered that a sale of the lands in the decree described had been made and approved by the Court before the commencement of this suit, and that the lands in the decree and mortgage and trust deed mentioned did not bring enough at said sale to satisfy and pay the amount due the complainant under the decree, as holders of the bonds of said railroad company, by an amount largely over the amount of the appeal bond in this cause sued on, and that the interest at the legal rate on the aggregate amount of the bonds of the railroad company, found due the complainants as established by the decree during the pendency of said appeal, would amount to a sum largely exceeding the amount of the appeal bond in this cause sued on."

No pleas were filed by defendants, although the stipulation recited that pleas proper to the case were filed. The first point made was that this Court had no jurisdiction to review the judgment, because the record did not show a stipulation in writing filed in Court waiving a jury; and, secondly, that the Court made no special finding of facts under section 700 of R. S., U. S., and therefore there was nothing before this Court to review.

This Court, speaking by Waite, C. J., refers to:

U. S. *vs.* Eliason, 16 Pet., 301.

Stimson *vs.* R. R. Co., 10 How., 346.

Graham *vs.* Bayne, 18 How., 62 (59 U. S. XV., 266).

Suydam *vs.* Williamson, 20 How., 434 (61 U. S. XV., 980).

Campbell *vs.* Boyreau, 21 How., 227 (62 U. S. XVI., 97).

Burr *vs.* Des Moines Co., 1 Wall., 102 (68 U. S. XVII., 562).

"Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the Court. It is manifest that the Act of 1865 was not intended to interfere with this practice. The evident object of that legislation was to give special findings the same effect for the purposes of a writ of error as a special verdict or an agreed case. This record shows distinctly that the Court was only required to determine whether in law on the agreed facts the defendants were liable on their bond."

The stipulation in the present record recites certain facts and says:

"Upon these admitted facts the Court is asked to declare the law and enter judgment accordingly."

The Court could not have found a single fact differing from the stipulation; upon these admitted facts the Court ruled plaintiff was entitled to recover.

This Court, in Norris *vs.* Jackson, 9 Wall. 125, in commenting on the difference between general and special verdicts under the Act of March 3, 1865, which is now, as I understand, Sec. 700 of the R. S. U. S., says:

"Special finding has often been considered and described by this Court. It is not a mere report of the evidence, but a statement of the ultimate facts upon which the law of the case must determine the rights of the parties, a finding of the proposition of facts which the evidence establishes and not the evidence on which these ultimate facts are supposed to rest."

This stipulation performs precisely that office. This Court, continuing to discuss the effect of a special finding, further said:

"In the case of a special verdict the question is presented as it would be if tried by a jury, whether the facts thus found would require a judgment for plaintiff or defendant; and this being a matter of law, the ruling of the Court on it can be reviewed in this Court on that record."

This statement of facts must be taken as part of the record; it was so intended by counsel; the Court so treated it (page 12 of abstract). The order reciting the trial says:

"This cause now coming on to be tried by the Court without a jury, pursuant to a written stipulation thereto herein filed and upon an agreed statement of facts, is argued by counsel." (Page 12 abstract.)

The waiving of the jury was explicit and was filed and made a part of the record. How can it be said that the first part of that stipulation was made a part of the record and not the last? Besides, the clerk certifies (page 19) the foregoing to be a true, perfect and complete transcript and copy of the record and proceedings theretofore had and entered of record in said Court, etc. To the second point, that the writ of error is taken for delay, I suppose counsel draws that conclusion from his first proposition that the Court has no jurisdiction to review this judgment.

The question to be decided involves a very important and difficult law point, which is whether the Comstock Mining Company had the power to take the legal title to the property in question and convey it by a trustee to the defendants, when it is admitted the company did not comply with section 10, article 15 of the Constitution of the State of Colorado, reading:

"No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served." To effectuate this constitutional provision, the legislature of the State of Colorado in the year 1887 passed an act entitled "An act to provide for the formation of corporations," in which it was enacted as follows:

"Sec. 23. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business, upon whom process may be served; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members, shall *purchase* or *hold* real estate in this State, except as provided for in this act."

Section 26 of the same act provided that a failure to comply with the provisions of section 23 should render the officers, agents and stockholders of the corporation individually liable on all its contracts made while the corporation was so in default.

The Court below ruled, taking title to real estate was doing business within the meaning of the constitution and laws of this State, and the Comstock Co. not hav-

ing complied therewith, it could not take title, and Groshon's conveyance to it was void. But, inasmuch as counsel has not assumed to discuss that question, of course we do not.

Respectfully submitted,

L. C. ROCKWELL,

E. A. REYNOLDS,

Attorneys for Plaintiffs in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1880.

EZRA D. FRITTS,
CHARLES H. BRIGGS, AND
JOSEPH A. THATCHER,
IMPLEADED WITH
WILLIAM A. SCOTT, AND
ADELAIDE M. SCOTT,
Plaintiffs in Error,
vs.
GEORGE W. PALMER,
Defendant in Error.

No. 72.

Brief and Argument for Plaintiffs in Error.

L. C. ROCKWELL,
E. A. REYNOLDS, AND
BERTRAM ELLIS,
Attorneys for Plaintiffs in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

EZRA D. FRITTS,
CHARLES H. BRIGGS, AND
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IMPLEADED WITH
WILLIAM A. SCOTT AND
ADELAIDE M. SCOTT,
Plaintiffs in Error,
vs.
GEORGE W. PALMER,
Defendant in Error.

No. 72.

The facts in this case are as follows:

First—That, on the sixteenth day of June, 1877, William Groshon held the title and owned the North Comstock and the Grand View lodes, situate in Central City mining district, Gilpin county, State of Colorado, and on that day sold to the Comstock Mining Company, a corporation, the said lodes, and conveyed to it the title thereto, by a deed in due form of law, properly signed, acknowledged and delivered, containing full covenants

of warranty. Which deed was upon the twenty-fifth day of June, 1877, recorded in book 62, at page 443, in the county records of Gilpin county. Said mining company was a corporation organized and existing under and by virtue of the laws of the State of Missouri, then doing business as a mining company in Gilpin county, State of Colorado.

That upon the said sixteenth day of June, 1877, at Central City, Gilpin county, Colorado, the said Comstock Mining Company made and delivered to Ezra D. Fritz, three promissory notes for ten thousand dollars each, two of which fell due on August 1, 1877, and the other upon December 1 of that year. Which thirty thousand dollars was used in part payment of the purchase money of said property, to secure which notes the said company at Central City, Colorado, on the twenty-third day of June, 1877, made, executed and delivered its certain deed of trust to Joseph A. Thatcher as trustee for said Fritts, whereby it conveyed to said Thatcher, all its right, title and interest in and to the said North Comstock and Grand View lodes; which deed of trust, was, upon the twenty-sixth day of June, 1877, duly recorded in the office of the clerk and recorder in and for Gilpin county, in book 64, at page 37.

The said deed of trust contained the usual covenants, providing in case of default in the payment of said notes, or either of them, or the interest due thereon, the trustee could advertise and sell the property.

Second—Default was made by the company in paying each of said notes, and afterwards, and on the fifth day of January, 1878, said Joseph A. Thatcher, trustee, sold the said Comstock and Grand View lodes, under the power, terms, clauses and conditions in said trust deed contained, at public sale, to Ezra D. Fritts, payee

in said notes, who received from said Thatcher, a trustees deed in due form of law, properly signed, sealed and acknowledged, and was, upon the seventh day of January, 1878, duly recorded in the office of the clerk and recorder of Gilpin county, book 64, at page 156.

Third—That plaintiffs in error, Joseph A. Thatcher, Charles H. Briggs and William Nicholson, derived their title and possession of the said North Comstock and Grand View lodes under and by virtue of divers mesne conveyances in due form of law from Ezra D. Fritts, who purchased at this trustee's sale.

Fourth—That the Comstock Mining Company was duly incorporated under and by virtue of the laws of the State of Missouri, on June 15, 1877, for the purpose of carrying on the business of mining in the State of Colorado, and upon the sixteenth day of June, 1877, at the time of the purchase of this property from William Groshon, was actively engaged in the prosecution of its business at and in the vicinity of Central City, in Gilpin county; had an office established in said city; was employing men and purchasing supplies and machinery for the prosecution of its mining business; and had sundry superintendents, agents and employés, and was prosecuting the usual business appertaining to mining in Colorado, and so continued to do until its business was sold out under the deed of trust, by Thatcher, on the fifth day of January, 1878.

Fifth—That the said Comstock Mining Company, at the time of purchasing the said property from the said William Groshon, had not, nor has it since at any time,

complied or attempted in anywise to comply with section one (1) of article fifteen (15) of the Constitution of the State of Colorado, nor with sections twenty-three (23) and twenty-four (24) of chapter nineteen (19) of the General Laws of this State, otherwise known as sections 260 and 261 of chapter 19 of the General Statutes of this State, describing the terms and conditions upon which foreign corporations may do business in this State.

Sixth—That the said William Gioshon, on the thirteenth day of April, A. D., 1878, made, executed, acknowledged and delivered in due form of law, his certain deed of quit-claim of all and singular the real estate and mining property in the said complaint mentioned, to Samuel S. Porter, which said deed was afterwards, and on the twentieth day of May, 1878, duly acknowledged and delivered to the said Samuel S. Porter, but still remains unrecorded; and the said Samuel S. Porter afterwards, and on the twentieth day of May, A. D., 1878, by his deed of quit-claim of that date, executed in due form of law, conveyed all and singular the said real estate and mining property to the plaintiff, George W. Palmer, which said deed was afterwards, and on the twenty-fifth day of May, 1878, duly acknowledged and delivered to the said George W. Palmer, but still remains unrecorded.

Seventh—That the value of the property in controversy exceeds $5,000, exclusive of costs.

Eighth—That a copy of the incorporation laws of the State of Missouri, under which this company was organized, were, at the time of the organization of this

company, on file in the office of the Secretary of State of the State of Colorado, but were not filed by this company.

That the articles of incorporation of this company were filed in the office of the clerk and recorder in and for Gilpin county, Colorado, where the company was authorized to do business in this State, and where its business interests were located on August 10, 1877, and that a copy of the incorporation laws of the State of Missouri, under which this company was organized, were also on file in the office of the clerk and recorder of Gilpin county at and after this company was organized, but were not filed by this company.

That during the time defendants have been in possession of the property, they have been holding the same in good faith, under the deeds above set forth, and they have paid as taxes which were legally assessed and levied upon said property, the sum of $400, and that plaintiff has paid no taxes thereon; that defendants have put improvements upon said property in the way of building and repairing the dwelling house described in the complaint, in the sum of $350; that the rental of said property during the time defendants have been in possession, has been $15 per month only.

Ninth—The plaintiff filed his complaint in the Circuit Court of the United States, District of Colorado, on the twenty-sixth day of June, 1879, against Ezra D. Fritts, Joseph A. Thatcher, C. H. Briggs, William Nicholson, William A. Scott and Adelaide M. Scott, as defendants. The citizenship of the respective parties gave the Court jurisdiction. The complaint charged defendants with ousting plaintiff from the Clipper lode as well as from the North Comstock and Grand View lodes.

Fritts, Thatcher, Briggs and Nicholson were the only defendants who appeared and defended and they disclaimed any interest in the Clipper lode, and denied they had ever been in possession thereof. Nicholson was dropped as defendant because he was a tenant. The contest arose over the title to the North Comstock and Grand View lodes, the common source of title to which was William Groshon. And the only contention in the Court below over the title, was that the Comstock Mining Company could not take nor hold title to these lodes because *it had failed to comply* with the *Constitution* and *Laws of the State of Colorado, prescribing certain conditions under which foreign corporations could take and hold property in this State.* Which conditions are as follows:

Section 10 of article 15 of the Constitution of Colorado reads:

"No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served."

And sections 260, 261 and 262 of chapter 19 of the General Statutes of the State of Colorado, page 186, read:

SEC. 260. "Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. *And no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State,* except as provided for in this act; and no corporation doing business in the State incor-

porated under the laws of any other State, shall be permitted to mortgage, pledge or otherwise encumber its real or personal property situated in this State, to the injury or exclusion of any citizen, citizens or corporations of this State who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other State, shall take effect as against any citizen or corporation of this State, until all its liabilities due to any person or corporation in this State at the time of recording such mortgage have been paid and extinguished."

SEC. 261. Every company incorporated under the laws of any foreign State or kingdom of any State or Territory of the United States, beyond the limits of this State, and now or hereafter doing business within this State shall file in the office of the Secretary of State a copy of their charter of incorporation, or in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law, duly certified and authenticated by the proper authority of such foreign State, Kingdom or Territory."

SEC. 262. "A failure to comply with the provisions of sections 23 (24) and 24 (25) of this act shall render each and every officer, agent and stockholder of any such corporation so failing herein, jointly and severally personally liable on any and all contracts of such company made within this State during the time that such corporation is so in default."

The Court found the issues in favor of the plaintiff below and against defendants therein, and held the deed made by William Groshon to The Comstock Mining Company was absolutely void, because the company was forbidden to take or hold title to real estate in this State until it had complied with the foregoing constitutional provision and statutory requirements.

That assuming to take title and giving a deed of trust was doing business within the intent and meaning of the law.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

The only error assigned is: The Court below erred in finding on the admitted facts the issues joined for plaintiff below and against defendants therein, and by holding and deciding the deed made by William Groshon to the The Comstock Mining Company, dated June 16, 1877, whereby the grantor assumed to convey the property in dispute to be void, because the company was forbidden under the laws of Colorado to take and hold title to real estate, because it had not as a foreign corporation observed the Constitution and statutory requirements in that behalf imposed upon such corporations, before they were authorized to do business within the State of Colorado.

The precise and practical question is, Was that deed void? If so, the judgment is right, otherwise it is wrong.

The Supreme Court of Colorado has never passed upon this precise question.

In the case of Utley *vs.* Clark-Gardner Mining Co., 4 Colo. 369, that Court held the company might bring an action of trespass for injury to its property, although it had not observed or attempted to comply with the above quoted provisions. This Court approved of that doctrine in case of Cooper Mfg. Co., Plff. in Err., *vs.* Ferguson *et al.*, 113 U. S., 727, and also discussed the object and purpose of the constitutional provision and statutory enactments upon the question under discussion, with which conclusions no complaint is made. In that case the Cooper Manufacturing Company, an Ohio corporation, made a contract in Colorado with Cooper, whereby it agreed to deliver certain machinery at Fort

Collins, in Larimer county, Colorado, and receive a stipulated price therefor. The company sued to enforce the payment of the money under that contract, and defendant set up the non-compliance by the company with the above constitutional and statutory enactments, in bar of plaintiff's recovery. The judges were divided as to the sufficiency of that defense, the circuit judge holding it to be good, the district judge holding otherwise.

That question came to this Court upon a certificate of division of opinion. This Court ruled such facts constituted no defense. Accepting the reasoning of this Court as perfectly sound, we still think the judgment of the Court below in this case, erroneous, because the question is not whether the Comstock Mining Company have a right to engage in mining, employ men, discharge them, and make other contracts incident to mining. The stipulated facts are (see page 10 abstract): "That before the purchase of the mining property from Groshon, the Comstock Mining Company was actively engaged in the prosecution of its mining business at and in the neighborhood of Central City, Gilpin county, Colorado, and that the company was organized for the purpose of mining."

It is proper to contend and say, buying and selling real estate is a distinct business from mining. For aught it appears in this record, this is the only property this company ever purchased or assumed to acquire by conveyance. When the company lost its title, it was not by a voluntary alienation, but by a forced sale. Neither is it stipulated that this property was necessary for the company in order to aid and promote its mining business. Neither does the giving of promissory notes and deeds of trust pertain to ordinary mining.

Again, this is not a contest where the company is seeking any right. It was a conduit through which the

title to real estate passed, and by proper conveyance became vested in plaintiffs in error. Neither the Constitution nor the laws of the State of Colorado declare by express words or necessary implication, that this deed made by Groshon to the company shall be void, because of the failure of the company to comply with the statutory requirements. Section 262 above quoted, attaches a penalty to the officers, agents and stockholders of any corporation by making such persons personally liable on any and all contracts made by such company during the time the company is in default in filing the certificate required. That being so, it seems to us the Court is not authorized to prescribe another disasterous penalty by saying that the company's acts are absolutely void while so in default. Purchasing this property from Groshon and receiving his deed was not illegal nor contrary to any right, privilege or immunity granted, given, bestowed or enjoyed by domestic corporations organized under the general incorporation laws of the State of Colorado.

Appealing to the law of comity, the deed is good, and I contend the statute does not in express language nor by necessary implication make it void. Upon this question I refer this Court to:

Harris Surv. Part. *vs* Runnels 12 How., 79

Which case arose in a suit upon a note given for slaves which were brought into the State of Mississippi and there sold in violation of a law of that State which provided that before slaves should be there sold, brought from another State, the vendor should produce a certificate signed by two respectable freeholders in the county and State from which the slaves were brought, and signed and acknowledged before the clerk of said county and certified by the clerk that the persons whose signatures were affixed thereto, were respectable freeholders

in that county and neighborhood where they resided, a minute description of the slaves should be given in the certificate and it should furthermore show such slaves had not been guilty or convicted of murder, burglary, arson or any felony within the knowledge or belief of such freeholders. The vendor likewise had to register such certificate in the Orphan's Court of the county where he offers the negroes for sale, and likewise swear he believes the certificate to be true. The same law prescribed a penalty of one hundred dollars upon the person selling slaves contrary to the provisions of that act. The endorser of the notes pleaded in bar the non-observance of the above statutory provisions by the payee of the note (the vendor of the slaves) in making sale of them. The question was, whether that statute made contracts entered into in violation of it void, and this Court ruled they were not. This Court has constantly held to the doctrine of that case.

See Reynolds *vs.* Croffordsville Bank, 112 U. S., 405.

Also, Bank *vs.* Matthews, 98 U. S., 628.

And, Bank *vs.* Whitney, 103 U. S., 99.

Swope *vs.* Leffingwell, 105 U. S., 3.

The last cases being those where National banks took deeds of trust and mortgages in violation of the banking act under which they were organized. And this Court has universally held the government alone can object; that the transaction is good and valid between the parties. In principle, these cases are closely analogous to the one at bar, because this Court in Reynolds *vs.* Bank, *supra*, said: "If there was any force in this objection to the title [viz: That the bank took title to more property than was mortgaged to it to secure the debt], it could not be raised by the debtor, for

where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable; the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

Also, The Manistee 5 Bissell C. C. R. 381., Decision by Miller, J.

And too, our clients are using this title as a shield. They are protecting their rights under it by saying it is anterior in date to plaintiff's deed, obtained from the same grantor and must prevail over it.

Barnes *vs.* Studdard, 117 Ill, 237.

It was contended below, as here, the laws of Colorado enjoins a duty upon the company and punishes a disobeyance of its command, not by avoiding the contracts of the company, but by holding its officers, agents, and stockholders personably liable on such contracts, while the company neglects to obey the law. It is as if the company had been required under a penalty, to publish a statement of assets or a list of its stockholders, or of its officers for the accommodation of the public and had neglected so to do. No one would contend the company by such failure had become incapable of making contracts, although it had, in fact, violated the law. And too, it seems to us, defendants cannot be in any worse condition than they would have been had they deraigned title from an alien who is forbidden to take and hold property. In other words, this conveyance is good unless the State interferes.

Cross *vs.* De Valle, 1 Wallace, 1 at p. 13.

The Court, speaking by Grier, J., says: "That an alien may take by deed or devise, and hold against any

one but the sovereign until office found, is a familiar principle of law, which it requires no citation of authority to establish. Nor is it affected by the fact that a statute of Rhode Island will permit aliens to take a license to purchase, which will protect them even as against the State; nor by the fact that a chancellor may not entertain a bill by an alien to enforce a trust, which, if conveyed to him, might immediately escheat to the crown."

Ferguson *vs.* Neville, 61 Cal., 356.

Beaird *vs.* The Bank of Washington, 11 Serg & R., 411; and Leazure *vs.* Hillegas, 7 Serg. & R., 313.

Banks *vs.* Poittiaux, 3 Rand. Va., 136.

In conclusion we invite the attention of the Court to the peculiar wording of section 260 of the Colorado Statute, *supra:* "And no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State except as provided for in this act."

There is nothing in the act which prescribes any conditions, nor states what domestic corporations shall do before they are authorized to purchase and hold real estate. They are required to do nothing. After they organize in accordance with chapter 19 of the General Incorporation Act, a domestic corporation may at once purchase and hold real estate, and if it is a mining corporation, no limitation is prescribed as to the amount of property they may purchase or hold. The statute intended to place foreign and domestic corporations on the same footing.

The Court will perceive, no point was made in the Court below, but what, under the laws of the State of

Missouri, the Comstock Company had a right to take and hold such property as it purchased in Colorado.

Respectfully submitted,

L. C. ROCKWELL,
BERTRAM ELLIS,
A. E. REYNOLDS,
Attorneys for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1888. No. [illegible]

EZRA D. FRITTS, *et al.*, *Plaintiffs in Error*,

vs.

GEORGE W. PALMER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

MOTION

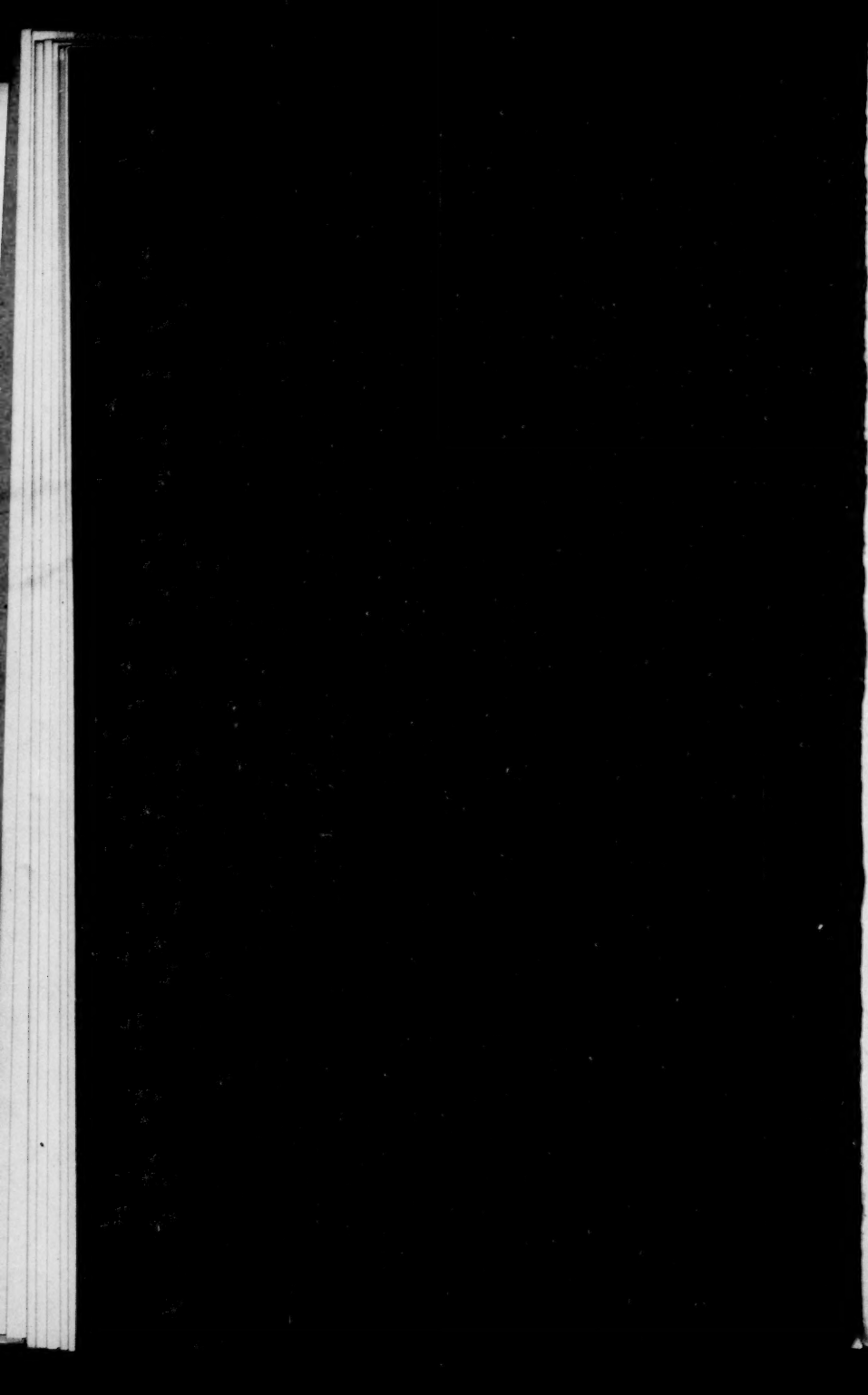
OF DEFENDANT IN IN ERROR TO DISMISS AND AFFIRM,

AND

BRIEF and ARGUMENT

THEREON.

JOSEPH SHIPPEN,
Attorney for Defendant in Error.



SUPREME COURT OF THE UNITED STATES.

October Term, 1888, No. 338.

EZRA D. FRITS, *et al.*, *Plaintiffs in Error*,

vs.

GEORGE W. PALMER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

MOTION of Defendant in Error to dismiss and affirm.

And now comes George W. Palmer, the Defendant in Error, by his attorney, and under Rule 6 moves the Court to dismiss the writ of error in the above stated case and affirm the judgment of the Court below, on the grounds that the record does not raise any question of law for the consideration of this Court, and it is manifest that the writ of error was taken for delay only, and the question on which the jurisdiction depends is so frivolous as not to need further argument.

JOSEPH SHIPPEN,
Attorney for Defendant in Error.

BRIEF AND ARGUMENT

in support of the foregoing motion.

The record presents no question of law which this Court can review.

This suit was brought in the U. S. Circuit Court for the District of Colorado, by the defendant in error, as plaintiff below, to recover of the plaintiffs in error possession of specific real property and for

damages. Trial was had before the Judge without the intervention of a jury, and no special finding of facts was made, and no bill of exceptions was taken to preserve the evidence offered or any exceptions made to any action of the Court. There was a general finding of facts upon the evidence for the plaintiff below, and a judgment accordingly. Thereupon the defendants sued out this writ of error.

The record shows as follows:

	Print.
Complaint in ejectment,	1
Amended answer,	12
Stipulation in writing waiving jury,	9
Order—Judgment for plaintiff,	14
Judgment,	15
Writ of error,	17

No special finding of facts.
No bill of exceptions.

The evidence on which the case was submitted below consisted of an agreed statement of facts signed by the attorneys and filed; but this statement was not made by the Court a part of the record of the case by any order or bill of exceptions, and it has no proper place in the transcript. The Court used it as the admissions *pro hac vice* of the parties by their attorneys, as any other evidence that might have been adduced, and thereupon made its finding generally for the plaintiff, as follows:

[Printed Record, p. 14.] "And this cause having heretofore "come on to be tried by the Court without a jury, pursuant to a "written stipulation thereto herein filed, and upon an agreed statement "of facts, and the Court having heard the arguments of counsel and "taken the same under advisement, and the Court having now suffi-"ciently advised in the premises, *the Court doth find the issues herein* "*joined for the said plaintiff and against the said defendants, and that* "*the said plaintiff is the owner of in fee and entitled to the possession of* "*the premises described in the complaint herein, and doth assess his dam-*"*ages* by occasion of the detention thereof in the sum of ———. "Wherefore on motion of the said plaintiff, it is ordered by the Court "that judgment be entered herein in favor of said plaintiff and against "the said defendants, Ezra D. Fritts, Joseph A. Thatcher, Charles H. "Briggs and William Nicholson, impleaded with William A. Scott "and Adelaide M. Scott, for the possession of the premises as in the "complaint herein described, for the sum of six hundred and forty-"five dollars ($645.00) damages for the detention thereof in form afore-"said assessed, and for the said plaintiff's costs to be taxed."

Upon which order formal judgment was entered. [Record, p. 15.]

The *U. S. Revised Statutes* provide as follows: *Section 649*, "Issues of fact in civil cases in any Circuit Court may be tried and determined by the Court, without the intervention of a jury whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the Court upon the facts

which may be either general or special shall have the same effect as the verdict of a jury."

Section 700. "When an issue of fact in any civil case in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to Section 649, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be revised by the Supreme Court upon a writ of error or upon appeal, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment"

Section 1011. "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, or for any error in fact."

The practice of this Court under these provisions has been fully settled.

Norris vs. Jackson, 9 Wall, 125.
Coddington vs. Richardson, 10 do., 516.
Bethell vs. Mathews, 13 do., 1.
Insurance Co. vs. Sea, 21 do, 158.
Martinton vs. Fairbanks, 112 U. S., 670.
Boardman vs. Ioffey, 117 do., 271.

In Norris vs Jackson *supra*, said sections 649 and 700 first received construction in the following propositions, reiterated in Insurance Co. vs. Sea *supra*, and ever since followed:

"1. If the verdict be a general verdict, only such rulings of the Court, *in the progress of the trial*, can be reviewed as are presented by the bill of exceptions, or as may arise on the pleadings.

"2. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.

"3. If the parties desire a review of the law involved in the case, *they must either get the Court to find a special verdict, which raises the legal propositions, or they must present to the Court their propositions of law and require the Court to rule on them.*

"4. Objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions."

In Coddington vs. Richardson, 10 Wall, 516, wherein the plaintiff in error took a bill of exceptions which set out all the evidence and showed that he excepted to the rulings of the Court in finding the issue for the plaintiff, in assessing the plaintiff's damages, in overruling a motion for a new trial and in rendering judgment, this Court said: "There is no question of law arising upon the pleadings or the trial. Those attempted to be raised refer to the evidence as embodied in the record, but which, in a trial of the facts before the Court, a jury being waived, we do not look into. *We look into them only when found by the Court.*" Affirmed.

In Bethell vs. Mathews, 13 Wall, 1, a jury was waived, no finding of facts was made, judgment was entered for the defendant, and writ

of error was taken to review said judgment. This Court, affirming the judgment, said: "*Nor can a statement of facts signed by counsel be noticed upon error.*" "There is therefore no error in the record, or none upon which we can take notice." Affirmed.

Special attention is called to

Martinton vs. Fairbanks, 112 U. S., 670, cited and followed in Boardman vs. Toffey, 117 do., 271, wherein the statutes and prior decisions are reviewed and the conclusion is reached: "When there is no demurrer to the declaration, or other exception to the sufficiency of the pleadings, no exceptions to the rulings of the Court in the progress of the trial, in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, or no motion in arrest of judgment, and the only matter presented by the bill of exceptions which this Court is asked to review arises upon the exception to the general finding by the Court for the plaintiff upon the evidence adduced at the trial, no question of law is presented which this Court can review." Affirmed

The case at bar, wherein there was neither any special finding of facts by the Court, nor any bill of exceptions preserved, falls clearly within these rulings. The absence of objection or exception to the action of the Court below shows that the parties acquiesced therein, and it is manifest the writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Hence this motion under Rule 6 is

Respectfully submitted.

JOSEPH SHIPPEN,
Attorney for Defendant in Error.

Supreme Court, U.S.
FILED
OCT 29 1889
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

October Term, 1889, No. 72.

EZRA D. FRITTS, *et al.*, *Plaintiffs in Error*,

vs.

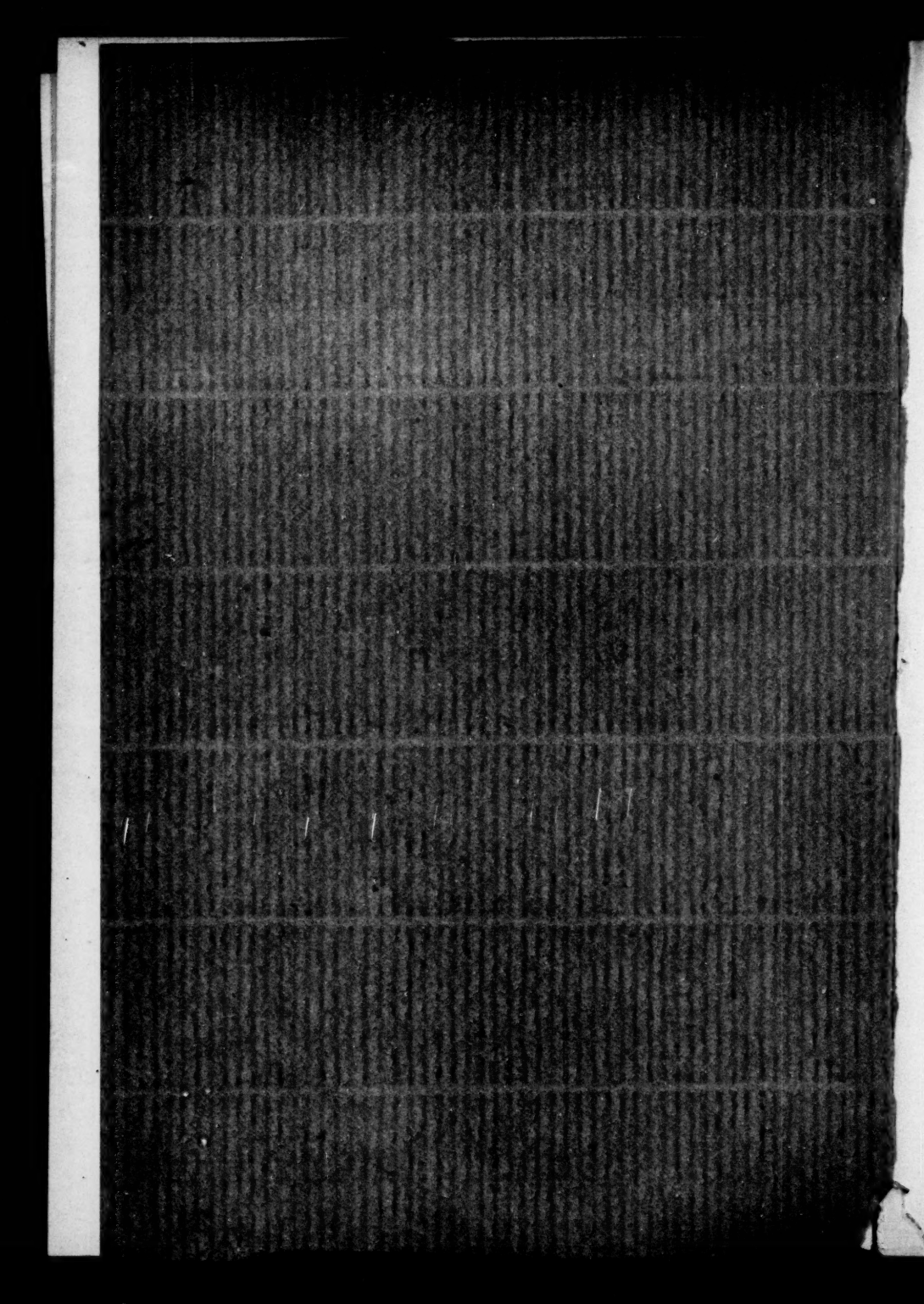
GEORGE W. PALMER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF AND ARGUMENT

OF DEFENDANT IN ERROR.

JOSEPH SHIPPEN,
Attorney for Defendant in Error.



SUPREME COURT OF THE UNITED STATES.

October Term, 1889, No. 72.

EZRA D. FRITTS, *et al.*, *Plaintiffs in Error*,

vs.

GEORGE W. PALMER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

STATEMENT, BRIEF, AND ARGUMENT

OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

THIS SUIT was brought in the U. S. Circuit Court for the District of Colorado, by the defendant in error, as plaintiff below, to recover of the plaintiffs in error possession of specific real property and for damages. Trial was had before the Judge without the intervention of a jury, and no special finding of facts was made, and no bill of exceptions was taken to preserve the evidence offered or any exceptions made to any action of the Court. There was a general finding of facts upon the evidence for the plaintiff below, and a judgment accordingly. Thereupon the defendant sued out this writ of error.

The record shows as follows :

	Print.
Complaint in ejectment,	1
Amended answer,	12
Stipulation in writing waiving jury,	9
Order—Judgment for plaintiff,	14
Judgment,	15
Writ of error,	17

No special finding of facts.
No bill of exceptions.

The evidence on which the case was submitted below consisted of an agreed statement of facts [Printed Record, p. 9.] signed by the attorneys and filed ; but this statement was not made by the Court a part of the record of the case by any order or bill of exceptions, and it has no proper place in the transcript.

By the terms of the stipulation it was agreed: "And this cause *for the purposes of this trial* shall be submitted to the Court upon the following agreed statement of fact:" Accordingly the Court used the statement as the admissions of the parties by their attorneys, *pro hac vice*, "for the purposes of this trial," as any other evidence that might have been adduced, and thereupon made for the plaintiff the following general finding:

[Printed Record, p. 14.] "And this cause having heretofore "come on to be tried by the Court without a jury, pursuant to a "written stipulation thereto herein filed, and upon an agreed state- "ment of facts, and the Court having heard the arguments of coun- "sel and taken the same under advisement, and the Court having "now sufficiently advised in the premises, *the Court doth find the* "*issues herein joined for the said plaintiff and against the said de-* "*fendants, and that the said plaintiff is the owner of in fee and en-* "*titled to the possession of the premises described in the complaint* "*herein, and doth assess his damages* by occasion of the detention "thereof in the sum of ———. Wherefore on motion of the said "plaintiff, it is ordered by the Court that judgment be entered "herein in favor of said plaintiff and against the said defendants, "Ezra D. Fritts, Joseph A. Thatcher, Charles H. Briggs and Wil- "liam Nicholson, impleaded with William A. Scott and Adelaide "M. Scott, for the possession of the premises as in the complaint "herein described, for the sum of six hundred and forty-five dol- "lars ($645.00) damages for the detention thereof in form afore- "said assessed, and for the said plaintiff's costs to be taxed."

Upon which order formal judgment was entered. [Record, p. 15.]

The agreed statement of facts [Printed Record, p. 9.] shows as follows:

First. This suit in ejectment is for the recovery of the real estate and mining property, with the appurtenances thereunto belonging, situated in Gilpin county, Colorado, described in the plaintiff's complaint herein, now in the possession of the said defendants, and has been since June 1, 1878.

Second. The common source of title to the said property is William Groshon.

Third. That the said William Groshon, on the 16th day of June, A. D. 1877, at Central City, in the said Gilpin county, made, executed, acknowledged, and delivered in due form of law his deed of warranty for the property described in the said complaint to the Comstock Mining Company, which was then a corporation created and organized under and by virtue of the laws of the State of Missouri and doing business as a mining company in said county of Gilpin, and said warranty deed was afterwards duly recorded in the office of the Clerk and Recorder of said Gilpin county, June 25th, A. D., 1877, in book 62, at page 443.

Fourth. That the said Comstock Mining Company afterwards, and on the same day, at the said city of Central, made, executed and delivered to the said Ezra D. Fritts, its three (3) certain

promissory notes, by the first of which it promised on or before August 1, 1877, to pay to the order of Ezra D. Fritts ten thousand dollars ($10,000) for value received, with interest from date until paid, at the rate of ten per cent. per annum, the said second not being payable on or before August 1, 1877, and said third not being payable on or before December 1, 1877, but in amounts and all other respects like said first mentioned note, which said sum of thirty thousand dollars ($30,000) was intended to be used and was used by the said company in part payment of the purchase money of said property so as aforesaid conveyed, to-wit, by the said William Groshon, and afterwards, and on the same day, for the purpose of securing the payment of the said promissory notes to the said Ezra D. Fritts, made, executed, acknowledged and delivered at Central City, in the said county of Gilpin its certain deed of trust to Joseph A. Thatcher as trustee for the said Ezra D. Fritts of all and singular the said property, except the said Clipper lode, in said complaint mentioned and described, conditioned that in case of default in payment of the promissory notes, or either of them, or the interest thereon, that the said trustee might sell and dispose of the said mining property for the purpose of paying the same in manner and form more particularly mentioned in the said deed of trust, which said deed of trust was dated on the 23d day of June, 1877, duly acknowledged at the said county of Gilpin, and afterwards, and on the 26th day of June, 1877, duly recorded in the said county of Gilpin, in book 64, at page 37.

Fifth. That afterwards and on the 5th day of January, in the year A. D. 1878, for default in the payment of the said promissory notes, the said Joseph A. Thatcher, trustee, caused the said deed of trust to be foreclosed under the power of sale in the said deed of trust contained, at the said city of Central, and on that day made, executed, acknowledged and delivered in due form of law his deed of all and singular the said real estate and mining property, excepting the said Clipper lode, to the said Ezra D. Fritts, which said trustee's deed was afterwards and on the 7th day of January, A. D., 1878, duly recorded in the said Gilpin county in book 64, at page 156.

Sixth. That the said defendants, Ezra D. Fritts, Joseph A. Thatcher, Charles H. Briggs, and William Nicholson, derived title and possession under and by virtue of divers mesne conveyances in due form of law from the said Comstock Mining Company and its assigns under said deed of trust for the property described in the complaint, excepting the said Clipper lode, which was not included in said deed of trust and has never been conveyed to any one by the said Comstock Mining Company.

Seventh. That the said Comstock Mining Company was duly incorporated under and by virtue of the laws of the State of Missouri, June 15, A. D., 1877, for the purpose of carrying on the mining business, and with the object in its articles of incorporation, expressed, to purchase, own and control mining property, both real and personal, in the State of Colorado, and to conduct a mining business therewith.

That afterwards and on the 16th day of June, 1877, and before the purchase of the said real estate and mining property from the said William Groshon, the said Comstock Mining Company was actively engaged in the prosecution of its said mining business at and in the neighborhood of Central City, in said county of Gilpin, established an office in the said city of Central, and was employing men and purchasing supplies and machinery for the prosecution of its said mining business, having sundry superintendents, agents and employees, and was then actively engaged in prosecuting the usual business appertaining to mining companies in this State, and continued so to do until after the making and foreclosure of the said deed of trust as aforesaid; that said company was organized for the purpose of mining.

Eighth. That the said Comstock Mining Company, at the time of purchasing the said property from the said William Groshon, had not, nor has it since at any time complied or attempted in anywise to comply with section ten (10) of article fifteen (15) of the constitution of the State of Colorado, nor with sections twenty-three (23) and twenty-four (24) of chapter nineteen (19) of the General Laws of this State, otherwise known as sections 260 and 261 of chapter 19 of the General Statutes of this State, 1883, describing the terms and conditions upon which foreign corporations may do business in this State.

Ninth. That the said William Groshon, on the 13th day of April, A. D. 1878, made, executed, acknowledged, and delivered, in due form of law, his certain deed of quit-claim of all and singular the real estate and mining property in the said complaint mentioned, to Samuel S. Porter, which said deed was afterwards and on the 20th day of May, 1878, duly acknowledged and delivered to the said Samuel S. Porter, but still remains unrecorded; and the said Samuel S. Porter afterwards and on the 20th day of May, A. D. 1878, by his deed of quit-claim of that date, executed in due form of law, conveyed all and singular the said real estate and mining property to the plaintiff, George W. Palmer, which said deed was afterwards and on the 25th day of May, 1878, duly acknowledged and delivered to the said George W. Palmer, but still remains unrecorded.

Tenth. That afterwards and on June 28th, A. D. 1879, at 9:15 o'clock a. m., the said George W. Palmer filed his *lis pendens* in the office of the Clerk and Recorder of said county of Gilpin, which now remains of record in book 69, at page 42 thereof, and in and by the same gave due notice, according to law, of the beginning of this suit and the nature of the same in manner and form as contained in the said complaint.

That the value of the property in controversy exceeds $5,000, exclusive of costs.

That a copy of the incorporation laws of the State of Missouri, under which this company was organized, were, at the time of the organization of this company, on file in the office of the Secretary of State of the State of Colorado, but were not filed by this company.

That the articles of incorporation of this company were filed in the office of the Clerk and Recorder in and for Gilpin county, Colorado, where the company was authorized to do business in this State, and where its business interests were located, on August 10th, 1877, and that a copy of the incorporation laws of the State of Missouri, under which this company was organized, were also on file in the office of the Clerk and Recorder of Gilpin county at and after this company was organized.

That during the time defendants have been in possession of the property they have been holding the same in good faith under the deeds above set forth, and they have paid as taxes which were legally assessed and levied upon said property the sum of $400, and that plaintiff has paid no taxes thereon; that the defendants have put improvements upon said property in the way of building and repairing the dwelling house described in the complaint in the sum of $350; that the rental of said property during the time defendants have been in possession has been $15 per month only."

The *Constitution of the State of Colorado*, 1876, provides, *Article XV, Section 10*, [General Statutes, 1883, p. 69]: "No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served."

The *General Statutes of the State of Colorado* provides *Section 213*, (March 14, 1877), *Chapter XIX, Section 23, p. 151* [Gen. Sts. 1883, p. 186]: "Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of Recorder of Deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business, upon whom process may be served; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members, shall *purchase* or *hold* real estate in this State, except as provided for in this act."

214, Section 24. "Every company incorporated under the laws of any foreign State or kingdom, or of any State or Territory of the United States beyond the limits of this State, and now or hereafter doing business within their State, shall file in the office of the Secretary of State a copy of this charter of incorporation; or in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law duly certified by the proper authority of such foreign State, Kingdom or Territory."

BRIEF AND ARGUMENT.

I.

The record does not raise any question of law for the consideration of this Court, inasmuch as there was no special finding of facts by the Court below, and no exceptions made to any action taken, and no bill of exceptions taken.

Section 649, of the *U. S. Revised Statutes*, provides as follows: "Issues of fact in civil cases in any Circuit Court may be tried and determined by the Court, without the intervention of a jury whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700. "When an issue of fact in any civil case in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to Section 649, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be revised by the Supreme Court upon a writ of error or upon appeal, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Section 1011." There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court or for any error in fact."

The practice of this Court under these provisions has been fully settled.

Norris vs. Jackson, 9 Wall, 125.
Coddington vs. Richardson, 10 do., 516.
Bethell vs. Mathews, 13 do., 1.
Insurance Co. vs. Sea, 21 do., 158.
Martinton vs. Fairbanks, 112 U. S., 670.
Boardman vs. Toffey, 117 do., 271.

In Norris vs. Jackson *supra*, said sections 649 and 700 first received construction in the following propositions, reiterated in Insurance Co. vs. Sea, *supra*, and ever since followed:

"1. If the verdict be a general verdict, only such rulings of the Court, *in the progress of the trial*, can be reviewed as are presented by the bill of exceptions, or as may arise on the pleadings

"2. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury.

"3. If the parties desire a review of the law involved in the case, *they must either get the Court to find a special verdict, which raises the legal propositions, or they must present to the Court their propositions of law and require the Court to rule on them.*

"4. Objections to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions"

This point the defendant in error attempted to raise at the last term of this Court, by motion to dismiss under rule 6; but as that motion was dismissed without intimation of the grounds of such action, and it may have been based on some informality of practice; the defendant in error takes the liberty to present the point again and call attention to the printed argument filed to support the motion.

Emphasis is laid on the facts that there was no special findings of fact; there was no bill of exceptions; the agreed statement of facts signed by the attorneys was limited by its terms to "the purposes of this trial;" and said agreement was not made part of the record by any order or action of the Court.

If, however, this Court passing on the merits of said motion dismissed it, or if it now holds that this point is not well taken, and that under the statutes and decisions above cited it has authority, in the absence of any special finding of fact, and of any exceptions or bill of exceptions, to review the case upon the evidence submitted to the Court below, then the case is to be considered on its merits.

II.

Upon the evidence, viz: the agreed statement of facts presented to the Court below, the judgment for the plaintiff below was correct and must be affirmed.

FIRST POINT.

A State can prohibit foreign corporations from purchasing and holding real estate within its limits.

Story's Conflict of Laws, Sections 427, 428.
Paul vs. Virginia, 8 Wall, 168.
Ducat vs. Chicago, 10 Wall, 415.
United States vs. Fox, 94 U. S., 315.
Christian Union vs. Yount, 101 U. S., 352.
Thompson vs. Waters, 25 Mich., 214.
Carroll vs. East St. Louis, 67 Ill., 568.
Starkweather vs. American Bible Soc., 72 Ill., 50.
Semple vs. Bank British Col., 5 Sawyer, 88.
Semple vs. Bank British Col., 5 Sawyer, 394.
Canada Southern R. R. Co. vs. Gebhard, 109 U. S., 537.
Relfe vs. Rundle, 103 U. S., 226.
Railroad vs. Kountz, 104 U. S., 11.
Bank of Augusta vs. Earle, 13 Pet, 519, 588.
N. Y. Dry Docks vs. Hicks, 5 McLean, 111.

Per Woods, J: "The right of the people of a State to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State has been settled by this Court." *Cooper Manufacturing Co. vs. Furguson, 113 U. S., 732.*

Citing 13 Pet 519, 8 Wall 168, 10 Wall 410, Supra.
Philadelphia Fire Assoc. vs. N. Y., 119 U. S., 111.
Pembina Consolidated Co. vs. Pennsylvania, 125 U. S., 181.

SECOND POINT.

Colorado, by its constitution and statutes *supra*, prohibited any foreign corporation from doing business (which included purchasing and holding real estate) in that State except upon compliance with the conditions precedent:

a. That it had made and filed with the Secretary of State and the Recorder of Deeds of the county in which the business iscarried on, the prescribed certificate as to its place of business and authorized agent; and

b. That it had filed with the Secretary of State a copy of its charter or its articles of association with a copy of the laws under which it was organized.

The text of the constitution and statutes is above given.

Cooper Mining Co. vs. Ferguson, 113 U. S., 111.
In re Comstock, 3 Sawyer, 218.
Semple vs. Bank British Col., 5 Sawyer, 88.
Semple vs. Bank British Col., 5 Sawyer, 394.
Bank of British Col. vs. Paige, 6 Oregon, 431.
Utley vs. Clark-Gardner L. M. Co., 4 Col., 369.
N. W. Mut. Life Ins. Co. vs. Overholt, 4 Del., 287.
Franklin Ins. Co. vs. Louisville Packet Co., 9 Bush, (Ky.), 590.
Cin, Mut. Health A. Co. vs. Rosenthal, 55 Ill., 85.
R. S. Ins. Co. vs. Slaughter, 20 Ind., 520.

THIRD POINT.

The Comstock Mining Company had not the legal capacity to purchase or hold or convey real estate in the state of Colorado, because—

a. Being incorporated under the laws of Missouri, "with the object in its articles of incorporation expressed, to purchase, own and control mining property, both real and personal, in the State of Colorado, and to conduct a mining business therewith," said Company had no corporate power to purchase or hold or convey real estate in Missouri, and acquired no power to do in Colorado what it could not do in the State of its creation and domicile.

Boyce vs. City St. Louis, 29 Barb 650.
Starkweather vs. Am. Bible Soc., 72 Ill., 50.
Land Grant R. R. &c. Co. vs. Coffey County, 6 Kansas 245.

b. Because being a Missouri corporation it did business in Colorado, within the meaning, intent and inhibition of its Constitution and Statutes, when it had not then and has not since complied or attempted to comply, in anywise, with said requirements thereof, relative to foreign corporations.

Therefore the attempted conveyance of the premises in controversy, by Groshon to said Company, and the attempted conveyance by it to Fritts' trustee were null and void *ab initio*. Defendants cannot, in a Colorado court, use or rely on such instruments as deeds.

Citations *supra:*
Washburn Real Property, 3 Vol., 588.
Bunday vs. Birdsall, 29 Barb., 388.
Jackson vs. Corey, 8 Johns 388.
Hornbeck vs. Westbrook, 9 do., 74.
Hulick vs. Schovil, 4 Gilm., 190.
Bussell vs. Topping, 5 McLean, 194.
Angel & Ames on Corporations, § 152.
Hayward vs. Davidson, 41 Ind., 214.
Lamb vs. Lamb, 6 Biss., 420.

FOURTH POINT.

Plaintiff, as grantee of Groshon, can assert the invalidity of said prior conveyance to said corporation, and the deed of trust made by said corporation under which defendants claim, and by virtue of his title plaintiff is entitled to recover in this action.

Citations *Supra.*
In re Comstock, 3 Saw., 218.
Semple vs. Bank British Col., 5 Saw., 88.
Utley vs. Clark-Gardner C. & M. Co., 4 Col., 369.
Russell vs. Topping, 5 McLean, 201.
Keen vs. Coleman, 39 Pa., 301.
Lowell vs. Daniels, 2 Gray, 168.
Thorne vs. Travelers Ins. Co., 80 Pa, 26.
Bigelow on Estoppel, 353.
2 Parsons on Contracts, 799.
Abbott vs. Omaha Smelting Co., 4 Neb., 416.

The deed does not stop the grantor, as estoppel by deed must be by a *valid* deed.

Bigelow on Estoppel, Part II, CIXI.
Pells vs. Webgrish, 129 Mass., 469.
Caffrey vs. Dudgeon, 38 Ind., 512, 520.
Starkweather vs. Am. Bible Soc., 72 Ill., 50.

There can be no estoppel in opposition to a public statute.

Fairtitle vs. Gilber, 2 T. R., 169.
Bank of U. S. vs. Owens, 2 Peters, 538.
Fowler vs. Sully, 72 Pa. St., 456.

ARGUMENT.

I. and II.

THE FIRST POINT is so fully established by the authorities cited it will scarcely be controverted, and it needs no argument.

THE SECOND POINT is likewise fully sustained upon principle and authority. In *Pembina Mining Co. vs. Pennsylvania, 125 U. S. 181*, upon review of the cases, the conclusion is stated *per* Field J.: "The only limitation upon this power of the State to exclude a "foreign corporation from doing business within its limits, or hiring "offices there, arises where the corporation is in the employ of "the federal government, or where its business is strictly commerce, "interstate or foreign."

The constitutional and statutory provisions of Colorado relative to foreign corporations have already been under the consideration of this Court in Cooper Manufacturing Co. vs. Ferguson, 113 U. S. 727. This was an action by the Cooper Manufacturing Co., an Ohio corporation, to recover from defendants damages for breach of contract made in Colorado for the sale and delivery in Ohio to the defendants a steam engine and machinery, it appearing that when the contract was made said corporation had not made and filed the certificate required by the 23d section of the act of 1877, and had neither known place of business nor authorized agent in Colorado. The certificate of division of opinion stated the question to be whether the constitution and statutes of Colorado were *under the circumstances stated* a bar to said action. The opinion of this Court answered the question in the negative and sustained the action on the ground that the prohibition against the doing of any business in the State by a foreign corporation except upon the prescribed condition, does not include the doing of a single and isolated act of business, such as the contract there in controversy. Mr. Justice Woods said, "The right of the people of a State to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State has been settled by this Court [citations *supra*]."

"As the clause in the constitution and the act of the legislature relate to the same subject like statutes *in pari materia*, they are to be construed together. The act was passed by the first legislature after the adoption of the constitution, and has been allowed to remain on the statute book to the present time. It must therefore be considered as a contemporary interpretation entitled to much weight. It must be conceded that if the contract on which the suit was brought was made in violation of a law of the State it can not be enforced in any Court sitting in the State charged with the interpretation and enforcement of its laws. * * * The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying

on of business in Colorado. The obvious construction therefore of the constitution and statute is, that no foreign corporation shall begin any business in the State with the purpose of pursuing or carrying it on until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the State, and naming an authorized agent residing at such principal place of business on whom process may be served."

Such "obvious construction" as above stated is precisely what is accepted, and is asked to be applied to the present case wherein the nature of the case and the facts and circumstances combine to demand the application, if it be conceded that said have any force of law at all.

The *Constitution of Colorado, (1876), Sec. 25 of Art. 5, (page 41), (Gen. Sts., 1883, page 43)*, prohibited the legislature from enacting any special laws, "granting to any corporation or association any special or exclusive privilege, immunity or franchise whatever." And by its 15th Article, (page 69), containing fifteen sections devoted to the subjects of *corporations*, rigid restrictions were imposed upon all such organizations. A State policy was thereby established in the fundamental law, relative to all corporations, whether existing or future, domestic or foreign, to keep them amenable to the legislative and judicial powers of the State for the protection of the public and her own citizens. The attempt is made to keep control of such organizations and guard against manifold evils therefrom experienced in other States.

But such rigorous policy as to domestic corporations would be of little avail if unextended as well to foreign corporations. If such were under the principle of general comity, allowed to come and go, and contract and acquire and convey property *ad libitum*, the constitution would only serve to crush domestic enterprise, while leaving the highway open, through foreign organizations, for all the evils designed to be prohibited. If domestic corporations needed control, *a fortiori*, those from abroad seeking to do business within the State needed like regulation. This would of course fall within the legislative power; but not content therewith, the framers of the Colorado constitution *ex industria* inserted the following prohibitory provision, relative to foreign organizations, viz:

Article XV, Section 10. "*No foreign corporation shall do any business in this State without having one or more places of business, and an authorized agent or agents in the same, upon whom process may be served.*"

To effectuate the well defined policy of the constitution, and especially of the above section, the legislature enacted in its code of general laws, chapter XIX, (page 143) on the subject of *Corporations*. Examination of this chapter reveals the clear intent to establish a uniform system of law for the new State, governing all domestic corporations in their creation, management and dissolution, for the just protection of all parties concerned. To this, publicity and accessibility of the corporate documents, is rigorously required.

Section 2 requires publicity of the articles of association, stating the basis of organization, with the names of the directors for

the first year, and the name of the principal, and of the county or counties in which business is to be carried on, by filing said articles in the public offices of the Recorders of Deeds in each of such counties, and of the Secretary of State.

Section 6 requires publicity of the time and place of holding stockholders' election by ten days publication thereof in the newspaper printed nearest to the place where the operations of the company are carried on.

Section 12 requires publicity of the fact that all capital stock has been fully paid, by a certificate signed and sworn to by the president and a majority of the directors, and recorded within sixty days in the public offices of the Secretary of State and county Recorder of Deeds.

Section 13 requires publicity to all stockholders of all books, accounts and papers of the corporation, refusal or neglect being a misdemeanor.

Section 16 requires publicity of the financial condition of corporations annually. It requires publication of the capital and the proportion paid in and the existing debts of the corporation, by a report signed by the president, verified by the oaths of the president or secretary under its corporate seal, and filed in the County Recorder's office under penalty of personal liability of the directors.

Section 31 requires a statement of affairs detailing its assets and liabilities by its secretary or treasurer upon demand of stockholders, and that it be kept accessible for examination.

Section 32 requires a book to be kept exhibiting the names and liabilities of all stockholders accessible to all stockholders; refusal or neglect thereof to constitute a misdemeanor.

Section 19 subjects the officers to individual liability if any report, statement or notice given by them be knowingly false.

Sections 27 and 30 provide for the institution and prosecution of suits against corporations and the modes in which process shall be served.

In addition to these statutory enactments relative to all corporations, the legislature of Colorado, to effectuate further the well defined policy of the Constitution, and especially of the above quoted section 10, enacted section 23 of chapter 15, (page 151) *supra.*

The true construction to be put upon the foregoing constitutional and statutory provision of the law of Colorado is embodied in the second point of this brief, to-wit: That a foreign corporation was thereby prohibited from purchasing and holding real estate except upon compliance with the conditions precedent: *(A)* that it had made and filed with the Secretary of State and a county Recorder of Deeds the prescribed certificates; and *(B)* that it had filed with the Secretary of State a copy of its charter or its legal equivalent.

A.

The language of the Constitution is the broad and universal prohibiting negative, "*No foreign corporation shall do business, etc.,*" and section 23 of the statute made to enforce said constitutional

provision is equally prohibitory, "*Foreign corporations, shall, be-*
"*fore they are authorized or permitted to do any business in this*
"*State, etc.* * * "*and no foreign corporation* * * * *shall pur-*
"*chase or hold real estate in this State, except as provided for*
"*in this act :*"—

These provisions of law are not directory—they are *mandatory*. The comity usually recognized between States in regard to their respective corporations ceases under these positive negative and prohibitory enactments. Comity rests upon the voluntary consent of one Nation or State to the laws of another Nation or State, having force within its jurisdiction, and such comity is not to be indulged in against the expressed will of such State.

Expressum facit tacitum cessare. "That which the words de-
"clare is the meaning of the instrument; and neither Courts nor
"Legislatures have the right to add to or take away from the mean-
"ing." It is for the Courts to enforce these provisions of express law, and not usurp the functions of law making power by depriving them of their inherent effect.

In re Comstock, 3 Sawyer 218, in the United States District Court of Oregon, (1874) in bankruptcy upon objection to proof of debt by the Bank of British Columbia, per Deady J. "The exist-
"ence of the foreign corporation styled the Bank of British Colum-
"bia is admitted by the assignee. But it is denied that such cor-
"poration has the power to transact business in this State except by
"its consent, and then only upon the terms of such consent; and
"it is claimed that a transaction in violation of such terms is illegal
"and void for want of power in the corporation." *After citing Augusta vs. Earle, 13 Pet. 538, Story's Conflict of Laws Section 38. Paul vs. Virginia, 8 Wall. 181. Lafayette M. Co. vs. French, 18, How. 407. Ducat vs. Chicago, 10 Wall. 400.* Deady J. proceeds :
"The bank then has no power to make a contract within this State
"without its permission or assent. If the State is silent on the
"subject, by comity of nations it is presumed, unless it would be
"contrary to its policy or interest [*As in Carroll vs. East St. Louis*
"*67 Ill. and Starkweather vs. Am. Bible Soc., 72 Ill. 50.*] But the
"State has spoken on the subject, and given its consent to the
"transaction of business within its jurisdiction by the bank, not
"absolutely, but upon a condition or limitation. This condition or
"limitation is found in the first clause of Sec. 8, of the act aforesaid,
"which provides that 'a foreign corporation before transacting bus-
"iness in the State must duly execute and acknowledge a power of
"attorney and cause the same to be recorded in the County Clerk's
"office of each county where it has a resident agent.' The State
"having this right to permit the bank to do business within its
"limits or not, with or without terms, has seen proper for the security
"of its citizens to require the execution and record of this power of
"attorney *before* the transaction of such business. The purpose of
"this requirement as disclosed in Section 9 of the act, is to thereby
"secure the appointment of an attorney authorized to receive ser-
"vice of process for the bank, so as to enable the citizens or in-

"habitants of Oregon, who may do business here with it, to sue it "in the Courts of the State, and thereby avoid the delay and ex- "pense, which would often be tantamount to a denial of justice of "following it into the Courts of the foreign jurisdiction where it was "created.

"But it is said that this statute is directory, and therefore the "acts of the foreign corporation done in disregard of it are not il- "legal and void. It is the duty of the Court to give effect to the "intention of the Legislature as far as practicable, and such inten- "tion should be ascertained from the subject matter to which it re- "lates. The words of this act are certainly mandatory in form: "*Before* transacting any business the corporation *must* appoint an "attorney. Language could not make it plainer. The purpose of "the act is apparent. As has been said it is to secure the people "of the State the right to sue the foreign corporation in the courts "of the State; but unless the attorney is appointed *before* the busi- "ness is transacted it will not be attained. In *Rex vs. Locksdale*, "*1 Burr, 447*, Lord Mansfield laid down the rule that whether a "statute is mandatory or not depends upon whether the thing di- "rected to be done is the essence of the thing required. Now the "appointment of an attorney is the very essence of the thing re- "quired in this case. In fact, nothing else is required, and with- "out this the statute would be utterly inoperative. This act being "mandatory, is therefore a prohibition against the transaction of "business by the bank in this State without first complying with "its terms, and, as a necessary consequence, all acts done in viola- "tion of it are illegal and void.

"The legal effect of the act is the same as if it read: It shall "be unlawful for any foreign corporation to transact business in "this State before appointing an attorney, etc." Numerous cases are cited and discussed supporting these views.

This case well considered on principle and authority is well in point. But the Oregon constitution had no prohibitory provision to enforce which the statute was enacted; the statute itself was in terms analagous to that of Colorado, but less strong, if anything; and the controversy related to a personal contract of debt and not to real estate. In all these particulars the case at bar is stronger than the case cited.

In *Bank of British Columbia vs Page, 6 Oregon, 431*, in a case involving the validity of a mortgage made to said bank, it was held: "That said act alluded to in the Comstock case is an indirect pro- "hibition against such corporations transacting business in the State "till they shall have executed and recorded the power of attorney "required by said section 8. A contract made by such corpora- "tion in this State before it shall have complied with the provis- "ions of said section 8 is as to third parties void, and cannot be en- "forced by the corporation against such parties." Affirming and adopting the reasoning of Deady J. *In re* Comstock.

In *Semple vs. Bank of British Columbia, U. S. Circuit Court for Oregon, 1878, 5 Sawyer, 88*, in an action of ejectment for recovery of possession of real estate purchased by said foreign corpora-

tion at a judicial sale thereof, in foreclosure of a mortgage made by plaintiff, it was held that the mortgage was void, because the foreign corporation had failed to comply with said Oregon statute. Following *In re Comstock, and Bank of British Columbia vs. Page*, and plaintiff, the mortgagor, recovered the property.

In *Semple vs. Bank of British Columbia, 5 Sawyer, 394*, an action between the same parties in the last cited case, for use and occupation of the same real estate, it was held that plaintiff could recover, inasmuch as the mortgage and sale thereunder to the foreign corporation was void.

In *Utley vs. The Clark-Gardner Lode Mining Co., 4 Col., 369*, a suit for trespass by a New York corporation which had not complied with the Colorado statute, section 213, the Supreme Court of Colorado, per Elbert J., held as follows:

"The constitution and statutory provisions cited, embody the "policy of one State toward foreign corporations. The statute "prescribes the terms and conditions upon which they may transact "business within the State, upon an equal footing with domestic "corporations. They shall designate, in a manner prescribed, their "principal place of business and an agent or agents residing thereat. "In substance, they shall put themselves in a position to be amena- "ble to the powers of the State Court. Similar statutes exist in "most of the States in the Union, the object being to protect the "citizens of the State dealing with foreign corporations, from hard- "ship of pursuing their rights in distant jurisdictions.

"The terms prescribed cannot be justly characterized as harsh "or onerous; on the other hand, they are simple and equitable, and "upon compliance, the doors are thrown wide open to foreign "capital, represented by foreign corporations, to compete in the "various industries and businesses of the State, upon an equal foot- "ing with domestic corporations.

"The statute is prohibitory in its terms, 'They *shall* file the "designated certificate, before they are authorized or permitted to "do any business in this State.'"

Citing *In re Comstock, 3 Sawyer, 223. Semple vs. Bank of British Columbia, 5 Sawyer, 88. Cincinnati Mut, etc. Co., vs. Rosenthal, 55 Ill., 85.*

"The prohibition extends to doing business before compliance "with the terms of the statute." "A corporation does business by "the exercise of its power to contract, its power to acquire and to "hold property, both real and personal, and like powers."

It is submitted that this is the correct interpretation and exposition of the law. It is so on principle as well as authority. But whatever might be the view of this Court, the construction put by the Supreme Court of Colorado, upon its own constitution and statutes, must be accepted as binding authority and must control the action of the Federal Courts.

U. S. Rev. St., Sec. 721.

Railroad Co. vs. National Bank, 102 U. S. 14, 57.

The positions herein taken are not only consistent with but inferentially supported by the decisions made upon the Territorial

In Land Grant, *R. R., etc. Co. vs. Coffey County, 6 Kas. 245*, the Supreme Court of Kansas indignantly refused to recognize a Pennsylvania corporation, created to do business outside of Pennsylvania.

(B.) The agreed statement of facts shows, by section 7, "that on the 16th day of June, 1877, and before the purchase of the said real estate and mining property from said William Groshon, (its grantor and the common source of title to the parties herein) the said Comstock Mining Company was actually engaged in the prosecution of its said mining business at and in the neighborhood of Central City, in said county of Gilpin, established an office in said city of Central, and was employing men and purchasing supplies and machinery for the prosecution of its said mining business, having sundry superintendents, agents and employees, and was then actively engaged in prosecuting the usual business appertaining to mining companies in this State, and continued to do so until after the making and foreclosure of the said deed of trust as aforesaid; that said company was organized for the purpose of mining; and by section 8, "that the said Comstock Mining Company, at the time of purchasing the said property from the said William Groshon, had not, nor has it since at any time, complied or attempted in anywise to comply with section ten (10) of article fifteen (15), of the Constitution of the State of Colorado, nor with sections twenty-three (23) and twenty-four (24) of chapter nineteen (19) of the General Laws of this State;" and by section 3, "that William Groshon on the 16th day of June, 1877, at Central City, in the said Gilpin County, made, executed and acknowledged in due form of law, his deed of warranty for the property described in the said complaint to the Comstock Mining Company; and by section 4, "that the said Comstock Mining Company afterwards and on the same day, at the said city of Central, made, executed and delivered to the said Ezra D. Fritts its three (3) certain promissory notes," * * * * * "and afterwards and on the same day, for the purpose of securing the payment of the said promissory notes to the said Ezra D. Fritts, made, executed, acknowledged and delivered at Central City, in the said county of Gilpin, its certain deed of trust to Joseph A. Thatcher, as trustee for the said Ezra D. Fritts, for all and singular the said property, except the Clipper lode in said complaint mentioned and described," with power of sale, etc.

Surely the foregoing constitutes a "doing of business," if anything is meant thereby. It may well be asked if that did not constitute doing business within the purview of the Colorado law, what would?

The facts of this case put it entirely outside of the ruling of the Supreme Court of Colorado in *Utley vs. The Clark-Gardner Lode Co., 4 Col., 369*, where the right of a foreign corporation simply to sue was sustained, and outside of the decision *supra* in *Cooper Mining Co. vs. Furguson, 113 U. S., 111*, when right to recover for machinery, the sale of which in Colorado to be delivered in Ohio constituted the only act done.

The agreed statement of facts leaves no room for argument that there was any compliance, or attempted compliance, with the requirements of the Colorado law, either as to filing its articles of incorporation or its certificate, as to its place of business, or as to its authorized agent. *Section 8.* "That the said Comstock Mining Co. at the time of purchasing the said property from the said William Groshon, had not nor has it since at any time complied or attempted in anywise to comply with section ten (10) of article fifteen (15) of the constitution of the State of Colorado, nor with sections twenty-three (23) and twenty-four (24) of chapter nineteen (19) of the general laws of this State."

Under these facts this third point must be sustained upon both grounds.

The incapacity of a foreign corporation to acquire real estate, and the invalidity of its deed, follow as necessary consequences from the mandatory and prohibitory constitutional and statutory provisions of Colorado law, when such corporation has been disregardful thereof. There is absolute inability to take It is not a case of transcending existing powers, where there is the power to take and hold until the right is assailed by the sovereign power. It is not a case of *ultra vires*, but of *non vires*.

The will of the sovereign is expressed in advance by constitution and statute presumed to be known to all and binding on all, that certain acts are prohibited, and thereupon it follows that any attempt to perpetrate the same is futile and null. The foreign corporation, disregardful of the law, is not a legal entity capable of doing business, of contracting or of acquiring or holding real estate.

An essential of a deed is a grantee capable of being contracted with. Blackstone (vol. 2. p. 296) says of the requirements of a deed: "The *first* is that there be persons able to contract and be con-"tracted with for the purposes intended by the deed."

Washburn on Real Property (3-588) says: "The next requisite of a good deed named is that it should contain the name of the grantor; and it is equally important that it should contain the name of the grantee."

Bundy vs. Birdsall, 29 Barb, 388.
Jackson vs. Corey, 8 Johns, 388.
Hornbeck vs. Westbrook, 9 Johns, 74.
Hulick vs. Scovil, 4 Gilm., 190.

In *Russell vs. Topping, 5 McLean, 194*, per Drummond J., in ejectment, the right of the State Bank of Illinois to hold land purchased at a mortgage foreclosure sale in violation of its charter, which restricted it to purchasing land for specified purposes, was fully and ably considered. The distinction is clearly drawn between corporate acts that are void and those that are voidable. Held: "That it is a principle universally acknowledged that a "corporation can only act in the manner indicated in its charter. "Anything absolutely prohibited by its charter, if attempted to be "done is a nullity.

"A title by deed implies a contract or at least competent par-"ties. A deed to a person having no existence is generally in-

"operative, and passes no title from the grantor. If a man grant "his estate to an imaginary corporation no title passes, and it is "the same if it is granted to a real corporation rendered incapable "by its charter of taking the grant. As to that particular faculty "it is not a corporation."

Semple vs. Bank of British Col., 5 Sawyer, 88, following *In re Comstock, 3 Saw., 218*, cited above is directly in point to sustain this proposition. Therein the mortgage and title thereunder acquired were held illegal and void under similar statutes of Oregon.

Cited approvingly by the Supreme Court of Colorado in Utley vs. Clark-Gardner L. M. Co., 4 Col., 369.

IV.

Plaintiff as grantee of Groshon can assert the invalidity of said prior conveyance to said corporation under which defendants claim, and by virtue of his title is entitled to recover in this action.

This proposition follows as a necessary consequence from the incapacity of the Missouri corporation to become purchaser of Colorado land, and the invalidity of its deed *ab initio*. Under the constitutional and statutory provisions of Colorado law, it is as if nothing had been attempted to be done. Groshon having the title, retained the same unaffected by the writing executed by him, because it was an absolute nullity. He was not estopped in anywise thereby, and his title conveyed to plaintiff entitles him to recover in this action.

In *Russell vs. Topping, 5 McLean, 201*, above cited, Drummond J. says: "If, however, the prohibition is absolute as to the taking "or purchasing, there is an entire incapacity to acquire the title. "In this case the bank could neither purchase, nor hold nor sell "real estate except under certain circumstances. These circum- "stances do not appear to have existed in this case, consequently "the State Bank did not acquire any title at the sale Where "then was the title? *It still remained in Howard It had not been "divested.* A title by deed implies a contract, or at least compe- "tent parties. A deed to a person having no existence is gener- "ally inoperative and passes no title from the grantor Even in "the case of an escrow, the title remains in the grantor till the "condition is complied with, and the deed delivered when it will "relate back for certain purposes to the time when it was delivered "by the grantor as an *escrow*. If a man grants his estate to an im- "aginary corporation which exists only in his own mind, no title "passes, and it is precisely the same if it is granted to a corpora- "tion rendered incapable by its charter of taking the grant. As to "that particular faculty it is not a corporation."

Upon the question of *estoppel* by deed in *Keen vs. Coleman, 39 Pa., per Lowrie, C. J.*, a married woman was held not to be *estopped* by her bond. "She had no legal power to execute this "bond and by it she cannot be legally bound. As in the case of "infancy, it is not a question of privilege, *but of legal incapacity to*

" *contract*, that stands in the way of the plaintiffs' recovery on this " bond. The wrong done cannot make the contract good by way " of *estoppel*. We do not see how there can be an *estoppel* involved " in the very act to which the incapacity relates, that can take away " that incapacity. If a legal incapacity can be removed by a " fraudulent representation of capacity, then the legal incapacity " would have only a moral bond or force, which is absurd."

Lowell vs. Daniels, 2 Gray, 168.

In *Thorne vs. Travellers' Insurance Co, 80 Pa., 26, per Mercur J.*, where a Connecticut corporation that had failed to comply with the requirements of Penna. law, it is held: "There can be no " doubt of the constitutional power of the legislature to prescribe " the conditions under which a foreign corporation shall transact " business in this state and the manner in which its agents shall be " qualified before entering on their duties."

" If Thorne was not duly qualified, under the statute, to act as " agent, but did so act under instructions from the company, both " he and the company were acting in violation of the express com- " mands of the statutes. If so acting, can the company sustain " this suit based on such illegal transaction?

It has often been held that an action founded on a transaction prohibited by statute, cannot be maintained, although a penalty be imposed for violating the law, and it cannot be expressly declared that the contract be void *Mitchell vs. Smith, 1 Binn, 118. Seidenbender vs. Charles Admrs., 4 S. & R. 151. Swan vs. Scott, 11 S. & R., 155. Columbia Bridge Co., vs. Haldeman, 7 W. & S. 233. Thomas vs. Brady, 10 Barr, 164. Scott vs. Duffy, 2 Harris, 20. Holt vs. Green, 23 P. F. Smith, 198.* In this last case it was said, the objection may often sound very ill in the mouth of the defendant; but it is not for his sake the objection is allowed.

It is founded on general principles of public policy, which he shall have the advantage of, contrary to the real justice between the parties. The principle of public policy is, that no Court will lend its aid to a party who grounds his action upon an immoral or an illegal act. The test whether a demand connected with an illegal transaction can be enforced at law, is, whether it requires the aid of the illegal transaction for its maintenance.

In conclusion, plaintiff contends that the state of Colorado, having the power to prohibit foreign corporations from acquiring real estate within its limits, exercised that power so as to prohibit such acts except on prescribed terms, with which the Comstock Mining Company, a Missouri corporation, but incapable of doing business in Missouri, failed to comply, and its attempt to acquire such property was futile and the conveyance thereof a nullity. Defendants' rights depend upon such attempted acquisitions and conveyance and hence cannot avail.

Debile fundamentum fallit opus.

The title to the premises remained in Groshon and thereupon plaintiff as his grantee is entitled herein to recover.